

H3NHCOT1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 COTY INC., COTY B.V., CALVIN
4 KLEIN TRADEMARK TRUST, CALVIN
5 KLEIN, INC., CALVIN KLEIN
6 COSMETIC CORPORATION, VERA
7 WANG LICENSING LLC, V.E.W.,
8 LTD., and ATE MY HEART INC.,

9 Plaintiffs,

10 v.

15 CV 7029 (JMF)

11 EXCELL BRANDS, LLC,

Trial

12 Defendant.

13 New York, N.Y.
14 March 23, 2017
15 9:05 a.m.

16 Before:

17 HON. JESSE M. FURMAN,

District Judge

18 APPEARANCES

19 KILPATRICK TOWNSEND & STOCKTON LLP

Attorneys for Plaintiffs

20 BY: LISA PEARSON

ROBERT N. POTTER

JAMES W. FARIS

ROBERTO GARCIA

21 BLANK ROME LLP

Attorneys for Defendant

22 BY: KENNETH L. BRESSLER

23 SIMON J.K. MILLER

H3NHCOT1

(Case called)

THE COURT: State your appearances, counsel.

MS. PEARSON: Good morning, your Honor. May it please the court, I'm Lisa Pearson from Kilpatrick Townsend, counsel for the plaintiffs. With me, your Honor, at counsel table are my colleagues, Robert Potter, James Faris, and Alberto Garcia.

THE COURT: Good morning.

MR. BRESSLER: Good morning, your Honor. Kenneth Bressler for defendants, or defendant. I'm here with Simon Miller.

THE COURT: All right. Good morning, and welcome to trial. Well, any housekeeping or other issues that you want to raise? And I don't know who's in the back. Any witnesses present in the courtroom?

MS. PEARSON: Your Honor, our first witness, Joseph Conklin, is in the courtroom.

THE COURT: Should he be excluded? I don't know what we're going to discuss.

MS. PEARSON: It was my understanding I was supposed to call him to the stand, have him authenticate his witness statement.

THE COURT: No, no, obviously that time will come.

MS. PEARSON: Right.

THE COURT: The question is whether there are any issues we need to discuss for which he should not be present.

H3NHCOT1

1 MS. PEARSON: I don't know whether the Court wishes
2 the witness to be in the room to discuss evidentiary objections
3 to his witness statement and exhibits.

4 THE COURT: I have no problem with him being present
5 for that, since it's his affidavit, but anything -- well, all
6 right.

7 Mr. Bressler.

8 MR. BRESSLER: I don't anticipate anything, your
9 Honor. If there is, we'll let the Court know.

10 THE COURT: OK. You had other issues you wanted to
11 raise?

12 MR. BRESSLER: No, I was just going to hand up a
13 binder with our new exhibits, if I may.

14 THE COURT: Sure. Do you have a new exhibit list, or
15 did we already receive that?

16 MR. BRESSLER: I don't know if it was sent to you
17 and --

18 THE COURT: I don't think we have an exhibit list with
19 these exhibits on it.

20 MR. BRESSLER: Well, I can give you the other side's
21 objections so it has everything on here.

22 THE COURT: OK.

23 MR. BRESSLER: It's in redline.

24 THE COURT: All right. Very good. Anything else?

25 All right. We'll get started in one second. Let me

H3NHCOT1

1 just say, as a preliminary matter, I'll rule on the objections
2 with respect to each witness in accordance with the process
3 that I described the other day.

4 Let me give you just some general comments. A number
5 of the objections were relevance objections under Rule 402.
6 I'm not going to get hung up on relevance issues here, unless
7 things get -- unless cross goes down directions that I think
8 are not relevant or profitable. It's a bench trial. If the
9 paragraphs to which defendant has objected are not relevant,
10 I'm not going to rely on them. If I do rely on them, then
11 they're relevant. So unless, again, you delve into the issues
12 that I think are irrelevant to an excessive length on cross,
13 I'll tell you, I don't think this is relevant. Let's move on.
14 I'm just not going to really get hung up on those issues.

15 Second, there were some objections to witnesses sort
16 of reference or discussion of legal issues. In general, I
17 think those objections are well-taken, that is to say, the law
18 is my province, not the province of any witness, Mr. Conklin or
19 otherwise. I'm not going to rely on those. I'll just say that
20 those are generally sustained, and I will disregard any
21 witness' description of what the law is.

22 Third, there are, I think, a number of objections with
23 respect to sort of newspaper articles, printouts from the
24 Internet, that sort of thing, on hearsay grounds. As I
25 understand it -- Ms. Pearson, correct me if I'm wrong -- those

H3NHCOT1

1 items are not offered for the truth but just generally to
2 show -- for the fact that they exist and as evidence of
3 objective evidence of fame, and what have you. Is that a fair
4 statement?

5 MS. PEARSON: Yes, your Honor. We gave you
6 representative newspaper articles, social media coverage, and
7 so forth, to prove the fame of the mark; and then some
8 highlights in that evidence, because it's voluminous, were
9 brought out in individual witness statements.

10 THE COURT: All right. Mr. Bressler, am I missing
11 something there? To the extent that's the case, I think it's
12 proper. I'm not going to rely on those for the truth of the
13 matter.

14 MR. BRESSLER: There are one category of documents,
15 your Honor, that I believe are hearsay and should be excluded,
16 and those are documents from the Internet showing that
17 purportedly certain items are available to be purchased from
18 certain websites. Number one, there's no evidence that they
19 actually were available, and often on websites things are not
20 available. There's no evidence that they're not counterfeit
21 products. There's no evidence about anything, and they're
22 being offered for the truth of the matter that the products are
23 being offered online.

24 THE COURT: I think you can cross-examine on those
25 issues. The fact that a witness found a listing for something

H3NHCOT1

1 and the listing itself is not hearsay. Whether it proves what
2 they say and whether it actually is what it purports to be is a
3 different matter.

4 Next is -- or the last category is there were some
5 objections with respect to paragraphs concerning essentially
6 whether things would or did or were likely to cause customer
7 confusion, or the like. In general, I think those are
8 well-founded, those objections, on the grounds that the
9 witnesses at issue here -- and I'm not talking about the expert
10 at the moment -- are not competent to be testifying about what
11 consumers do or do not believe, but I will address those
12 objections as we bring them up and deal with them.

13 All right. Yes.

14 MS. PEARSON: May I ask one question on that point,
15 your Honor? In certain cases the witnesses are drawing an
16 inference from underlying facts that are known to them. May we
17 elicit, when we put the witness on the stand, the underlying
18 facts and just omit the inference that they're drawing?

19 THE COURT: I'll deal with that as it comes up rather
20 than answer in the abstract.

21 MS. PEARSON: Thank you.

22 THE COURT: With that, let's get to trial. Sorry.
23 One last thing, just a housekeeping matter. Because it's a
24 bench trial and no one will be using the jury room from our
25 side of things, you're welcome to have your witnesses stay in

H3NHCOT1

Conklin - direct

1 there while they're waiting. The only thing I would ask is
2 this door is alarmed right here, so please instruct them not to
3 use that door to come in and out of the courtroom, and you
4 yourselves should not use that door. Instead, everybody should
5 go through the main hallway, and then there's a separate
6 entrance there. But if you'd like to utilize that room while
7 folks are waiting, you're welcome to do so.

8 All right. Please call your first witness.

9 MS. PEARSON: We call to the stand Joseph J. Conklin,
10 senior vice president and global deputy general counsel of
11 plaintiff Coty Inc.

12 THE COURT: All right. Mr. Conklin, you may approach.

13 JOSEPH J. CONKLIN,

14 called as a witness by the Plaintiff,

15 having been duly sworn, testified as follows:

16 THE COURT: You may proceed, Ms. Pearson.

17 MS. PEARSON: Your Honor, may I approach the bench to
18 provide the witness with three exhibits, his witness statement,
19 Plaintiffs' Exhibit 1, and Plaintiffs' Exhibit 1*?

20 THE COURT: You may.

21 DIRECT EXAMINATION

22 BY MS. PEARSON:

23 Q. Mr. Conklin, can you please state your full name and your
24 title for the record.

25 A. Yes. My full name is Joseph Conklin. My title is senior

H3NHCOT1

Conklin - direct

1 vice president and global deputy general counsel for Coty Inc.

2 THE COURT: Mr. Conklin, you're going to need to keep
3 your voice up so everybody can hear you. Maybe move the
4 microphone a little closer to you, please.

5 Go ahead.

6 Q. Mr. Conklin, did you prepare a direct testimony affidavit
7 or declaration in this lawsuit?

8 A. Yes, I did.

9 Q. Could you please take a look at Plaintiffs' Exhibit No. 253
10 which I've placed before you. Is that a copy of the direct
11 testimony declaration that you submitted?

12 A. Yes, it is.

13 Q. Is there anything that requires updating or supplementation
14 from your perspective in your declaration?

15 A. Not that I believe, no.

16 Q. Mr. Conklin, in your declaration in paragraph 5, you refer
17 to Plaintiffs' Exhibit 1, which I have put before you. Does
18 Plaintiffs' Exhibit 1 depict each Coty fragrance product at
19 issue besides the unauthorized alternative fragrance sold by
20 the defendant?

21 THE COURT: Counsel, his affidavit says that, so why
22 don't you proceed.

23 MS. PEARSON: OK. The issue, your Honor, is simply
24 that we created a more legible version of Plaintiffs' Exhibit
25 No. 1, which is marked Plaintiffs' Exhibit No. 1*, and I wanted

H3NHCOT1

Conklin - direct

1 Mr. Conklin to --

2 THE COURT: All right. Mr. Conklin, have you reviewed
3 Exhibit 1*? Maybe we can even avoid -- Mr. Bressler, is there
4 any dispute that 1* is identical?

5 MR. BRESSLER: Haven't seen it, your Honor.

6 MS. PEARSON: It has been supplied to defendant. It
7 simply provided more legible photographs of the products at
8 issue because we realize that Plaintiffs' Exhibit 1, the
9 quality of the photographs had deteriorated over time through
10 duplication. They're not identical photographs, but they're
11 the identical products.

12 THE COURT: I will tell you what. Why don't we --
13 I'll take counsel's representation. Mr. Bressler, you can
14 review it if you like, and if you have any problem --

15 MR. BRESSLER: They gave it to Mr. Miller a minute
16 ago.

17 MS. PEARSON: No, no, this is a document we supplied a
18 long time ago.

19 THE COURT: Bottom line is I'll take your
20 representation at face value, assume this is identical to
21 Plaintiffs' Exhibit 1, and we'll use it on the theory that it's
22 a more usable version of Exhibit 1.

23 MS. PEARSON: I appreciate that, your Honor.

24 THE COURT: So you may proceed. Let's cut to the
25 chase.

H3NHCOT1

Conklin - direct

1 MS. PEARSON: Your Honor, at this time I would like to
2 move for the admission of Mr. Conklin's direct testimony which
3 has been marked as Plaintiffs' Exhibit No. 253, as well as the
4 exhibits to which defendant has no objection that are
5 referenced in that testimony, which are Plaintiffs' Exhibits 1
6 through 31, 33 through 80, 155 through 60, and 174 through '75.

7 THE COURT: That's it?

8 All right. Mr. Bressler, let's start with the
9 exhibits. Any objection to the exhibits?

10 MR. BRESSLER: To the ones that Ms. Pearson just
11 recited, I assume those are ones we have no objection to.

12 THE COURT: All right. So they are admitted without
13 objection.

14 (Plaintiffs' Exhibits 1 through 31, 33 through 80, 155
15 through 160, 174 through 175 received in evidence)

16 THE COURT: I've reviewed defendant's objections to
17 the affidavits. Let me give you those rulings now. There are
18 objections to paragraph 18, the second sentence and the last
19 sentence. Those are overruled.

20 The objections to paragraphs 20, 21, 22, 23 in their
21 entirety, those are overruled as well. Again, to the extent
22 that there's a relevance objection, I will either rely on such
23 things, in which case they are relevant, or not, in which case
24 you don't need to worry about it.

25 Paragraphs 25 and 29, Ms. Pearson, are you relying on

H3NHCOT1

Conklin - direct

1 Rule 803(17) for those as well? Is that the issue here?

2 MS. PEARSON: The Nielsen data discussed in
3 paragraph 25 is the same information discussed in the Rotter
4 declaration, your Honor.

5 THE COURT: All right. So I'll reserve judgment on
6 that issue pending the briefing that will be submitted by
7 tomorrow.

8 What's the Rule 901 issue, Mr. Bressler?

9 MR. BRESSLER: Authentication of the Nielsen data.

10 THE COURT: I know what Rule 901 says.

11 MR. BRESSLER: I understand. But there's been no
12 foundation laid that this is authentic, that he has any
13 knowledge about these reports, that it's complete, anything
14 about it. But we will be submitting our letter on Friday as
15 well.

16 THE COURT: All right. Well, the Rule 901 issue is a
17 slightly different one than you'll be briefing.

18 Ms. Pearson, if you want to elicit some testimony on
19 that to address whatever the 901 objection may be, I'll allow
20 you to do that on a limited basis in a moment. Again,
21 otherwise, I reserve judgment on the 803(17) issue. The
22 objection to paragraph 26 is overruled.

23 In accordance with my comments earlier, paragraph 29,
24 the second and last sentence, again, that's a 803(17) issue,
25 and I'll reserve judgment.

H3NHCOT1

Conklin - direct

1 Paragraph 50 there's an objection to the paragraph --
2 the language beginning "which means that" through the end of
3 the paragraph, and that is legal conclusions and is sustained,
4 again for the reasons I stated earlier. So those are my
5 rulings there.

6 Ms. Pearson, if you'd like to examine Mr. Conklin
7 briefly with respect to the foundation on the Nielsen data,
8 you're welcome to do that.

9 BY MS. PEARSON:

10 Q. Mr. Conklin, could you direct your attention to
11 paragraph 25 of your direct testimony, please.

12 A. OK. I'm on paragraph 25.

13 Q. In the second sentence, you reference highly confidential
14 data collected by Nielsen. Do you see that?

15 A. I do.

16 Q. Did you personally examine the highly confidential data
17 collected by Nielsen that has been marked as Plaintiffs'
18 Exhibit 154-1?

19 A. I cannot speak to the exhibit number without seeing the
20 document, but I did review an exhibit that was Nielsen data.

21 Q. And on that document, did you observe that defendant's
22 Diamond Collection fragrances are sold at certain mass market
23 retailers on that printout?

24 A. That is what the Nielsen data that I reviewed stated.

25 Q. Can you identify the retailers selling Diamond Collection

H3NHCOT1

Conklin - direct

1 fragrances that you observed on that list?

2 MR. BRESSLER: Objection.

3 THE COURT: Sustained.

4 Ms. Pearson, the issue is what the document is, how it
5 came to be, how he came to get it, how he knows what it is.
6 That's what authentication is about, not what the document
7 actually says.

8 MS. PEARSON: Your Honor, the document has been
9 authenticated by Mr. Rotter. We are not relying upon
10 Mr. Conklin to authenticate the document.

11 THE COURT: Great. So it's --

12 MS. PEARSON: Mr. Conklin --

13 THE COURT: So the Rule -- If I'm speaking, you have
14 to stop -- the Rule 901 objection is overruled subject to
15 connection. If the connection is made, then there's no issue.
16 If it's not, then it will be sustained.

17 MS. PEARSON: Thank you. Thank you, your Honor.

18 THE COURT: All right. Cross-examination.

19 MS. PEARSON: Your Honor, I believe that there are
20 some additional exhibits that are referenced in Mr. Conklin's
21 declaration as to which Mr. Bressler had evidentiary
22 objections, so I did not include them in the first batch of
23 noncontroversial exhibits that I moved to admit. Would you
24 like me to move to admit the other ones?

25 THE COURT: Yes, please.

H3NHCOT1

Conklin - direct

1 MS. PEARSON: Or would you like to address the
2 evidentiary objections?

3 All right. I believe the first one to which
4 Mr. Bressler has objected is Plaintiffs' Exhibit 153.

5 THE COURT: What paragraph is that referenced in?

6 MS. PEARSON: Paragraph 41, your Honor. It is the
7 Coty Inc. consumer complaint concerning Love Story.

8 THE COURT: What's the objection, Mr. Bressler?

9 MR. BRESSLER: I'll withdraw the objection and
10 cross-examine the witness on it.

11 THE COURT: All right. That exhibit is admitted.

12 (Plaintiffs' Exhibit 153 received in evidence)

13 THE COURT: Next.

14 MS. PEARSON: I believe that we have previously
15 addressed Plaintiffs' Exhibit 154, the Nielsen data.

16 THE COURT: All right. And I've reserved judgment on
17 that, so we can --

18 MS. PEARSON: There was an objection to Plaintiffs'
19 Exhibit 163, printouts from the Amazon website of listings for
20 relevant fragrances.

21 THE COURT: I think I've addressed that. Those are
22 admitted merely for the fact that those listings appear on
23 Amazon. Whether it proves what you think it proves is a
24 different matter.

25 MS. PEARSON: I believe then that ruling applies to

H3NHCOT1

Conklin - direct

1 Plaintiffs' Exhibits 163, 164, 165, 168, and I would move for
2 the admission of those exhibits.

3 THE COURT: All right. Any objection, Mr. Bressler,
4 in light of my ruling?

5 MR. BRESSLER: Given your ruling, no objection, your
6 Honor.

7 THE COURT: All right. Those are admitted.

8 (Plaintiffs' Exhibits 163, 164, 165, and 168 received
9 in evidence)

10 THE COURT: Next.

11 MS. PEARSON: Similarly, your Honor, Plaintiffs'
12 Exhibit 232 is printouts of fragrances from the Dollar General
13 website. 235 is printouts from perfumeimpression.com showing
14 defendant's fragrance. And 246 is selected customer lists and
15 sales by customer documents for plaintiffs' fragrances.

16 THE COURT: Any objections to those, Mr. Bressler?

17 MR. BRESSLER: Well, your Honor, to all of the
18 Internet printouts, to the extent they deal with products other
19 than the products at issue, I object based on relevance.

20 THE COURT: All right. That's overruled for the
21 reasons I've described.

22 (Plaintiffs' Exhibits 232, 235, and 246 received in
23 evidence)

24 THE COURT: Next.

25 MR. BRESSLER: OK. 236.

H3NHCOT1

Conklin - cross

1 THE COURT: 236?

2 MR. BRESSLER: I'm sorry.

3 MS. PEARSON: 246.

4 MR. BRESSLER: I'm sorry. 246, I have no objection.

5 THE COURT: All right. Those are admitted.

6 MS. PEARSON: Thank you, your Honor.

7 THE COURT: That's it?

8 MS. PEARSON: That's it, your Honor.

9 THE COURT: Great. All right. Cross-examination.

10 Counsel, the witness indicated he would like some
11 water. Maybe you can approach and give him some.

12 All right. You may, proceed, Mr. Bressler.

13 CROSS-EXAMINATION

14 BY MR. BRESSLER:

15 Q. Good morning, Mr. Conklin.

16 A. Good morning, Mr. Bressler.

17 Q. If you could, as the Court suggests, move the microphone
18 closer to you or you to it, that would be very much
19 appreciated.

20 A. Is that better?

21 Q. Very much so. Thank you.

22 In 2005, Coty sent a cease and desist letter to a
23 company called MD Distributors; isn't that correct?

24 A. Yes, I believe it is correct.

25 Q. And that would be Exhibit BBB.

H3NHCOT1

Conklin - cross

1 May I approach, your Honor?

2 THE COURT: You may.

3 MR. BRESSLER: Would you like a copy?

4 MS. PEARSON: Thank you.

5 Q. Is that a copy of the cease and desist letter sent to MD
6 Distributors?

7 MS. PEARSON: Your Honor, I must object because on its
8 face the letter is a demand letter written by -- on behalf of
9 Zino Davidoff S.A.

10 MR. BRESSLER: Your Honor, perhaps we can have
11 Ms. Pearson on the stand and testify.

12 THE COURT: There's no question other than, Is that a
13 copy of the cease and desist letter? I don't think that's
14 question is objectionable. The witness may testify and answer.

15 Mr. Conklin, you may answer.

16 A. I apologize, Mr. Bressler. Could you repeat the question.

17 Q. Is Exhibit BBB a copy of the cease and desist letter sent
18 to MD Distributors?

19 A. Yes, it is.

20 Q. You if look to the bcc page on the back of, I guess it's
21 the third page, it says that a copy was sent to Robert Cravens.
22 Who is Mr. Cravens?

23 A. Mr. Cravens was an attorney at Coty.

24 Q. He was your predecessor, was he not?

25 A. He was -- he had a different title, but he had

H3NHCOT1

Conklin - cross

1 responsibility for trademark matters at Coty prior to my
2 arrival.

3 Q. And you had testified in your affidavit that Coty, or we,
4 had sued MD Distributors; correct?

5 A. By Coty.

6 Q. Coty was in charge of sending this cease and desist letter,
7 weren't they?

8 A. I apologize, Mr. Bressler, but I don't know. That was
9 before my time at the company, and I do not know if it was Coty
10 or it was Zino Davidoff who the letter purports to be on behalf
11 of.

12 Q. This is a copy of the cease and desist, though?

13 A. Yes, it reads like a cease and desist letter to me.

14 THE COURT: Mr. Conklin, you were not there in 2005;
15 is that correct?

16 THE WITNESS: That's correct.

17 THE COURT: All right. Thank you.

18 Q. Were you designated as a corporate representative on behalf
19 of Coty to testify about enforcement efforts made by Coty to
20 protect its trademarks?

21 A. I'm not certain of the exact designation in the 30(b)(6)
22 notice, but generally speaking, that would be correct.

23 MR. BRESSLER: I move Exhibit BBB into evidence.

24 THE COURT: Any objection?

25 MS. PEARSON: I have a relevance objection, your

H3NHCOT1

Conklin - cross

1 Honor, but I will abide by your ruling.

2 THE COURT: All right. It is admitted.

3 (Defendant's Exhibit BBB received in evidence)

4 BY MR. BRESSLER:

5 Q. Now, this Exhibit BBB was sent to Coty -- I'm sorry, to MD
6 Distributors prior to the time that Coty or Zino Davidoff knew
7 the full extent of the infringement by MD Distributors; isn't
8 that true?

9 A. I would assume that would be true, yes.

10 Q. OK. According to the complaint -- and I will show you a
11 copy of the complaint filed against MD distributor. It's been
12 marked as Exhibit 156-1.

13 Your Honor, I have an extra copy with tabs to the
14 relevant pages if your Honor would like it --

15 THE COURT: All right.

16 MR. BRESSLER: -- to make it easier. May I approach?

17 THE COURT: You may.

18 THE WITNESS: Thank you.

19 MR. BRESSLER: Your Honor, Plaintiffs' Exhibit 156-1
20 has been admitted into evidence already.

21 THE COURT: All right. You may proceed.

22 BY MR. BRESSLER:

23 Q. Now, according to the complaint, an investigator was sent
24 to MD Distributors' retail outlet in February 2006. That's
25 paragraph 43.

H3NHCOT1

Conklin - cross

1 THE COURT: Is that a question?

2 Q. Is that correct that the investigator was sent in 2006?

3 MS. PEARSON: Objection, your Honor.

4 THE COURT: Sustained.

5 A. I don't know.

6 Q. An investigator was sent to MD's retail outlet; correct?

7 A. I don't know.

8 MS. PEARSON: Objection, your Honor.

9 THE COURT: He said he didn't know. Let's proceed.

10 Go ahead.

11 Q. According to the complaint which is admitted into evidence,
12 pictures of the infringing goods were taken by the investigator
13 and a sample was purchased; correct?

14 A. Could I read it to try to find the relevant paragraph
15 because it's --

16 Q. I'll represent it to you.

17 THE COURT: Bottom line is the complaint is not
18 admissible for the truth, so I'm not going to rely on it for
19 the truth. And since he wasn't there at the time of the
20 underlying events, I don't see any reason to examine him about
21 these things. So --

22 MR. BRESSLER: I think he was.

23 Q. Were you at Coty at the time this complaint was filed?

24 A. What is the date on the complaint?

25 Q. It is September 2008.

H3NHCOT1

Conklin - cross

1 Your Honor, the witness had introduced this in his
2 affidavit.

3 THE COURT: I understand. This is one of these areas
4 where I'm inclined to agree it's not actually relevant, so why
5 don't you move on.

6 MR. BRESSLER: OK.

7 Q. The item at issue in the MD case can be seen on the second
8 tab, can it not, GK One?

9 A. If I may, excuse me one moment.

10 Q. This is the alleged alternative, or knockoff, MD
11 Distributors was selling of Calvin Klein's CK One product, and
12 a better copy can be seen in the second tab.

13 MS. PEARSON: I object to the form.

14 THE COURT: Ms. Pearson, you can't mumble your
15 objections. You have to speak up and into the microphone.

16 Sustained.

17 MS. PEARSON: I object to the form.

18 THE COURT: Sustained as to form.

19 MR. BRESSLER: Your Honor --

20 Q. Mr. Conklin, is Exhibit G to the complaint, the photograph
21 that's on the second and fourth tab, is that a copy -- a
22 photograph of the copy of the item which Zino Davidoff
23 complained MD Distributors was selling and that was infringing
24 the CK One product?

25 A. Exhibit J, you said, correct, Mr. Bressler?

H3NHCOT1

Conklin - cross

1 Q. Excuse me?

2 A. Exhibit J, you said?

3 Q. The second tab is part of Exhibit G and then J, yes, you're
4 right. The first tab is G; the second is J.

5 A. Mr. Bressler, I was not involved in the drafting of this
6 complaint, so I'm not certain I can read the complaint and try
7 to cross-reference the language to the exhibit and speak to
8 what it says. But if your question, which I believe it to be,
9 is what the complaint was at the time, I just do not know.

10 Q. I will move on.

11 Your Honor, I'd like to show the witness Exhibit AAA.
12 May I approach, your Honor?

13 THE COURT: You may.

14 Q. Can you identify what Exhibit AAA is with the product at
15 Exhibit AAA?

16 A. Yes, it appears to be CK One.

17 Q. And this was the earlier version of the packaging from CK
18 One?

19 A. I'm not sure what you mean by "earlier."

20 Q. Well, CK One packaging has changed, hasn't it? And you can
21 see it on Plaintiffs' Exhibit 41.

22 A. Yes.

23 Q. So Defendant's Exhibit AAA is the earlier packaging for CK
24 One; correct?

25 A. Yes.

H3NHCOT1

Conklin - cross

1 Q. Now, the exhibit shown in the complaint in the second tab,
2 the item in the second tab looks very much like the product
3 that Calvin Klein was selling, the CK One product; right?

4 A. I would agree with that.

5 MR. BRESSLER: Now, I move Exhibit AAA into evidence.

6 THE COURT: Any objection?

7 MS. PEARSON: I don't know what it is, your Honor, but
8 if it's just being offered to show the old packaging, I don't
9 have a problem.

10 THE COURT: All right. Admitted.

11 (Defendant's Exhibit AAA received in evidence)

12 BY MR. BRESSLER:

13 Q. In 2010, MD Distributors entered into a consent judgment
14 with Zino Davidoff; right?

15 A. Yes.

16 Q. And this is another document that you introduced into
17 evidence.

18 And it's been admitted, your Honor, 156-2. May I
19 approach, your Honor?

20 THE COURT: You may.

21 A. Thank you.

22 Q. 156-2 is a copy of the consent judgment entered into with
23 MD Distributors; correct?

24 A. Yes.

25 Q. And what part did Coty play in this consent judgment?

H3NHCOT1

Conklin - cross

1 A. I'm not sure what that means.

2 Q. Well, Ms. Pearson was handling the litigation; correct?

3 A. Yes.

4 Q. Was Ms. Pearson being paid for by Coty?

5 A. I'm not certain. I was not involved in this case, so I'm
6 not certain.

7 Q. Looking to the Exhibit 156-2, you see that -- well, Zino
8 Davidoff and Calvin Klein Trademark Trust are -- their
9 fragrances are distributed by Coty; right?

10 A. That's correct.

11 Q. And pursuant to the agreements that Coty has with Zino
12 Davidoff and Calvin Klein, litigation is generally brought or
13 controlled by Coty; correct?

14 A. Not necessarily.

15 Q. Do you know whether -- withdrawn.

16 Looking to this paragraph 1.18 of this agreement, this
17 agreement with MD Distributors at paragraph 1.18 says,
18 effectively says, that MD Distributors is permitted to
19 distribute product that bears the legend "our version of"
20 Calvin Klein's Obsession, for example, as long as the version
21 is not confusingly similar; correct?

22 MS. PEARSON: Objection, your Honor.

23 THE COURT: Overruled.

24 A. No, I don't believe that is correct.

25 Q. What does the agreement say, then?

H3NHCOT1

Conklin - cross

1 A. Well, shall I --

2 THE COURT: Counsel, the agreement speaks for itself.
3 It's in evidence. I'll take a look at it.

4 MR. BRESSLER: OK.

5 THE COURT: Next question.

6 Q. Zino Davidoff and Calvin Klein said, were agreed with MD
7 Distributor, that if they used an "our version" phrase, it
8 would not be in contempt, it would not be a violation of this
9 agreement; correct?

10 MS. PEARSON: Objection, your Honor.

11 THE COURT: Overruled.

12 Ms. Pearson, you've got to speak up.

13 Q. Paragraph 1.18. 1.18.

14 A. I do not see anything in paragraph 1.18 that speaks to the
15 issue of contempt.

16 MR. BRESSLER: I'll refer the Court to paragraphs
17 1.18, 1.19, and 3.2.

18 Q. Mr. Conklin, you know that Wayne Hamerling was at MD
19 Distributors; right?

20 A. That's what I've been informed. But Mr. Bressler --

21 Q. I'm sorry. Just answer the question, please.

22 And you know that or you've been informed that
23 Mr. Hamerling was in charge of the alternatives division at MD
24 Distributors; right?

25 A. I'm not certain of his exact role. I know that he had a

H3NHCOT1

Conklin - cross

1 role at MD Distributors, or I've been informed of that.

2 Q. And you know that Excell was formed within a week of the
3 time this consent judgment was entered into?

4 A. I've learned through this litigation that Excell started
5 shortly after this was entered, after this consent judgment was
6 entered into, yes.

7 Q. And you know that Mr. Hamerling was the one who formed --
8 or one of the formers or founders of Excell; right?

9 A. I know that now, yes.

10 Q. Now I'd like to show you if you look at the tabbed exhibit
11 of Exhibit -- the complaint, which is Exhibit 156-1, and you
12 see what the product looks like that Mr. Hamerling was selling
13 under the name GK One, and I'd like you to compare that with --
14 may I approach, your Honor?

15 THE COURT: You may.

16 Q. -- the product that they are now selling or that they
17 changed to.

18 Your Honor, I have an extra copy for the Court to look
19 at. The box is very informative.

20 MS. PEARSON: I have to object to the lack of
21 foundation as to the product Mr. Hamerling was selling as GK
22 One.

23 THE COURT: Sustained.

24 Q. Well, we know, based upon the complaint admitted into
25 evidence, that this case, Exhibit 156-1, was brought based upon

H3NHCOT1

Conklin - cross

1 a product that looked like Exhibit J in Exhibit 156-1; correct?

2 A. Could I refresh myself with the complaint?

3 Q. Yes. It is the third tab.

4 THE COURT: Mr. Conklin, do you have any firsthand
5 knowledge of the allegations in the complaint that you're
6 looking at, or is your knowledge based purely on reading it?

7 THE WITNESS: Purely on reading it.

8 THE COURT: All right. Let's move on.

9 MR. BRESSLER: Well, I'd like to -- your Honor, as the
10 witness is here on behalf of Calvin Klein, I'd like to compare
11 the product that is now being sold or that the witness -- the
12 changes that were made from what was at issue in 156-1 to what
13 is now being sold.

14 THE COURT: I think that's argument. I don't think
15 you need to elicit it from the witness. Go ahead.

16 Q. Mr. Conklin, you know that after the lawsuit was settled
17 with MD Distributors, that Excell came out with a product
18 called OK New York; correct? Would you like to see the
19 product?

20 A. I would like to see the product, please. Yes.

21 Q. I'm sorry?

22 THE COURT: He'd like to see it.

23 MR. BRESSLER: May I approach?

24 THE COURT: Could you make a record of what exhibit it
25 is.

H3NHCOT1

Conklin - cross

1 MR. BRESSLER: It is Exhibit 71.

2 A. Yes, it's one of the products at issue in this case.

3 Q. And that is the version of Plaintiffs' Exhibit 41. May I
4 show you?

5 May I approach, your Honor?

6 THE COURT: You may.

7 Q. Is that correct?

8 A. The question is, is this product the version of this
9 product?

10 Q. Correct.

11 A. Yes, it says, "Our version of CK One."

12 Q. And you see that the name is different, OK New York for CK
13 One; correct?

14 A. Correct.

15 Q. And you see that the packaging is different. One has a
16 skyline on it and lines around "OK"; correct?

17 A. There are differences in the packaging.

18 Q. And there's no lines or skyline on CK One, are there?

19 A. There's no skyline on CK One, that's correct.

20 Q. And you see on the top of the box, CK One has "Calvin
21 Klein" and OK New York says "Diamond Collection"?

22 A. Correct.

23 Q. And you see to the front of CK -- of OK New York, a
24 disclaimer that says, "Our version of CK One by Calvin Klein"?

25 MS. PEARSON: Objection, your Honor, to "disclaimer."

H3NHCOT1

Conklin - cross

1 THE COURT: Overruled.

2 A. I see the statement that says, "Our version of CK One."

3 Q. And you see on the back another disclaimer -- or a
4 disclaimer that says, "OK New York is not associated with the
5 makers of CK One by Calvin Klein"?

6 A. Yes, I see that statement on the back of the packaging.

7 Q. Now, you know that Excell has been selling products since
8 at least 2012?

9 A. Yes.

10 Q. And from documents we've produced to you, you know that
11 they've been selling products since 2010?

12 A. I do not recall any -- that I reviewed documents that
13 suggest 2010, but I certainly know that we are aware that they
14 were selling products in 2012.

15 Q. Now, you never sent a cease and desist letter to Excell,
16 did you?

17 A. We did not.

18 Q. None of the plaintiffs in this case sent a cease and desist
19 letter to Excell, did they?

20 A. Not that I'm aware of, no.

21 Q. Now, you see that Excell's packaging for OK New York is
22 very different than the packaging for GK One that Mr. Hamerling
23 and MD Distributors were selling previously; right?

24 A. I'd have to take a look at the GK One packaging.

25 MR. BRESSLER: It is the -- your Honor, the second tab

H3NHCOT1

Conklin - cross

1 on the complaint, Exhibit 156-1. Your Honor, would you like a
2 copy? I have an extra of the packaging for your Honor to look
3 at.

4 THE COURT: Sure.

5 MR. BRESSLER: May I approach?

6 THE COURT: You may.

7 MR. BRESSLER: These are marked from deposition
8 without the stickers.

9 A. I believe the question was is the packaging very different?
10 I think it's different. It's changed, for sure. I don't know
11 to what degree I would use an adjective or adverb, but it
12 certainly changed.

13 Q. Clearly, it's changed insofar as the name was changed;
14 right?

15 A. GK was changed to OK.

16 Q. And "One" was changed to "New York"?

17 MS. PEARSON: Objection to the lack of foundation.

18 THE COURT: Overruled.

19 A. I'm not sure how we say they're changed when they're
20 different companies that are at issue, because I'm not sure you
21 can say one was changed to the other. They're different
22 companies. They're different products. So one is with --

23 Q. Mr. Conklin, can you answer the question? Are they
24 different?

25 Let's rephrase it. Is there a difference between the

H3NHCOT1

Conklin - cross

1 packaging that Mr. Hammering put out at MD Distributors versus
2 the packaging he put out at Excell; right?

3 MS. PEARSON: Objection.

4 THE COURT: I think the exhibits speak for themselves,
5 so let's move on.

6 Q. You already testified that no cease and desist letter was
7 sent. How was Mr. Hamerling to know that the changes that he
8 made from the product that was -- he had out at MD Distributors
9 to the product he sold at Excell were not OK with you folks?

10 MS. PEARSON: Objection, your Honor. I can explain
11 the objection. I just don't want to do anything in front of
12 the witness that offends the Court. But there is a fundamental
13 lack of foundation in this line of questioning.

14 THE COURT: Well, I'll allow the witness to answer if
15 he knows, so you may proceed.

16 A. Can you repeat the question.

17 Q. You didn't send cease and desist to Excell. How was
18 Mr. Hamerling to know that the changes he made in the product
19 that they offered at MD to the product he offered at Excell,
20 the change in the name, the change in the packaging, the
21 addition of "our version of," the addition of disclaimers, the
22 addition of the skyline and the lines around the name, the
23 disclaimer on the back, how was he to know that was not enough
24 for you folks?

25 THE COURT: Sustained as --

H3NHCOT1

Conklin - cross

1 MS. PEARSON: Objection, your Honor.

2 THE COURT: Sustained as to form.

3 Q. Is there anything that you did --

4 A. Well, I can answer the question. I think the question's
5 still pending; correct?

6 THE COURT: No.

7 Q. No.

8 Is there anything that Coty or any of the plaintiffs
9 in this case did that would have allowed Excell to know and
10 Mr. Hamerling to know that the packaging for OK New York was
11 insufficient or objectionable prior to the time that you
12 brought suit?

13 A. Yes.

14 Q. What did you do to tell them?

15 A. We sued him in MD Distributors case -- or I say him. We
16 sued MD Distributors who you've represented he was a senior
17 executive with, and we sued him for his decoded GK product and
18 never entered into any type of an agreement that would have
19 authorized him to otherwise infringe our products.

20 Q. Are you aware that in 2014 -- well, let me show you first
21 Exhibit 219 which has been admitted into evidence.

22 May I approach, your Honor?

23 THE COURT: You may, although I don't have 219 in
24 evidence.

25 MR. BRESSLER: There was no objection to it, your

H3NHCOT1

Conklin - cross

1 Honor. We were working on the basis that anything that's not
2 objected to is entered into evidence.

3 THE COURT: Is that, in fact, how you ultimately
4 resolved things, Ms. Pearson?

5 MS. PEARSON: Well, we have a stipulation to that
6 effect, but I don't have Exhibit 219.

7 MR. BRESSLER: There you go.

8 THE COURT: All right. You may proceed, and I'll deem
9 219 admitted. Over the course of the trial we'll make a record
10 as to what exhibits fall in that stipulation. Over the course
11 of the trial, if you could just say Exhibit 219, which is one
12 of the exhibits subject to the parties' stipulation, and then
13 I'll admit it so there's no ambiguity, that would be helpful.

14 MR. BRESSLER: Thank you, your Honor.

15 (Plaintiffs' Exhibit 219 received in evidence)

16 THE COURT: All right.

17 BY MR. BRESSLER:

18 Q. Exhibit 219 -- what's the firm of Fross Zelnick?

19 A. It's a law firm in New York City.

20 Q. And that's where Ms. Pearson used to work?

21 A. You would have to ask her.

22 Q. Does Coty use Fross Zelnick?

23 A. We do not. Actually, we work with a lot of firms. I do
24 not believe that we are currently working with Fross Zelnick.

25 We may have from time to time on one matter or another, but I'm

H3NHCOT1

Conklin - cross

1 not aware of working directly with anyone at Fross Zelnick.

2 Q. Do you have -- if you look at paragraph 1.5 of Exhibit 219
3 and you compare that to the agreement with MD Distributor,
4 paragraph 1.18, you'll see that they are exactly verbatim the
5 same, and they both state: "Our version shall refer to any
6 fragrance product that is not unlawful under the Lanham Act and
7 it bears marks, descriptions, or other indicia that make clear
8 that it's not a Davidoff fragrance product or Calvin Klein
9 fragrance product; that is, instead, a version of or
10 alternative to a Davidoff fragrance product or Calvin Klein
11 fragrance product. Our version of fragrance products shall not
12 include decoded, counterfeit, and knockoff fragrance products
13 as defined herein."

14 Do you see that's the same in both agreements?

15 MS. PEARSON: Objection.

16 THE COURT: Overruled.

17 Just yes or no, are those the same?

18 THE WITNESS: I'm just reading through the -- the
19 respective --

20 MS. PEARSON: It's difficult for us to hear the
21 witness.

22 THE COURT: It's difficult to hear everybody who is
23 not speaking loudly. So a reminder, I feel like I'm a broken
24 record, but you have to speak loudly and into the microphone.

25 And, Mr. Conklin, please do the same.

H3NHCOT1

Conklin - cross

1 THE WITNESS: Thank you.

2 Well, the first sentence is the same. It appears to
3 me that the second sentence is different. When I say "the
4 same," I mean substituting the one product for the other in the
5 respective documents.

6 Q. Do you know how Fross Zelnick -- how come Fross Zelnick
7 used the same language in --

8 THE COURT: Sustained.

9 Q. -- Exhibit 29?

10 And you know that in this exhibit which you folks have
11 put in on -- in paragraph 3.1(a), "Lacoste will not object to
12 Excell brands of our version fragrances," and it goes on. So
13 you see that. Were you aware of this?

14 A. I'm sorry. I don't think I follow the question. Which
15 paragraph?

16 Q. 3.1.

17 A. 3.1 of which agreement?

18 Q. (a) on the agreement which is 219.

19 A. So the Lacoste agreement?

20 Q. Correct. See the Lacoste did not object to Excell's use of
21 the phrase "our version"; correct?

22 A. I don't believe I can speak to this document without having
23 some time to review it, but that's not how I read it.

24 THE COURT: Mr. Conklin, were you involved in the
25 drafting of this document in any way?

H3NHCOT1

Conklin - cross

1 THE WITNESS: No, it has nothing to do with Coty.

2 THE COURT: What's the relationship, if any, between
3 Lacoste Alligator S.A. and Coty?

4 A. Today there is no relationship because that brand was owned
5 by Proctor & Gamble's specialty beauty brands business. We
6 acquired that business, including the Lacoste license, as of
7 October 1 of this year, so just a few months ago. At this
8 point in time, there was no relationship between Coty and
9 Lacoste.

10 THE COURT: All right. So let's move on.

11 MR. BRESSLER: Thank you, your Honor.

12 Q. Now, in your affidavit you gave reasons why you didn't
13 bring suit against Excell earlier. I'd like to take you
14 through them. Firstly, you did learn of Excell in 2012;
15 correct?

16 A. Correct.

17 Q. And in 2012 you performed testing of at least two of Coty's
18 products; correct?

19 A. Correct.

20 Q. And those testings include chemical analysis; correct?

21 A. Correct.

22 Q. Yet you waited after doing those tests three years to bring
23 suit; correct?

24 A. I'm not sure that was quite three years, but it was
25 two-plus years, yes.

H3NHCOT1

Conklin - cross

1 Q. In your affidavit you say that one of the things you're
2 worried about, that Coty's worried about, you do not want your
3 products to "be associated with inferior products that pose
4 potential health and safety risks to the public"; right?

5 A. Correct.

6 Q. And you also say that the Excell products diminish the
7 prestige and dilute the strength of your marks; right?

8 A. Correct.

9 Q. Why did you wait almost three years to sue them? Why did
10 you -- I'll wait for that answer. Why did you wait almost
11 three years?

12 A. As I said in my declaration which you refer to, there are a
13 couple of reasons. And, obviously, bringing a lawsuit like
14 this is quite expensive, so I needed to have some budget
15 approval. There were a number of other factors as well. At
16 some point in time we were hoping not to, frankly, bring a
17 lawsuit. We saw that Excell was being sued by another party
18 that we hoped might resolve all matters related to the manner
19 in which they were infringing our products. There were a
20 variety of reasons along those lines, but it was -- it is what
21 it is. It was more than two years.

22 Q. Let's go through the reasons. Now, you say in your
23 affidavit you didn't know the extent of Excell's use; correct?

24 A. Correct.

25 Q. Now, in other cases you've sent investigators to alleged

H3NHCOT1

Conklin - cross

1 infringers' locations in order to determine the extent of
2 infringement; correct?

3 A. In some cases, yes, that's correct.

4 Q. You didn't send an investigator to Excell, did you?

5 A. I don't recall if we did. I believe we used an
6 investigator to find out some of the products that were being
7 sold, and I believe that's how we came to test some of the
8 Excell products.

9 Q. Did that investigator provide you any information in
10 writing?

11 A. I don't recall if there was anything provided in writing or
12 if we just received some product.

13 Q. When did you receive the product?

14 A. It was late 2012.

15 Q. And that's the product that you tested; correct?

16 A. I believe so.

17 Q. That investigator took pictures of the product that it
18 bought; right?

19 A. I believe pictures were taken, yes.

20 (Continued on next page)

H3NPCOT2

Conklin - Cross

1 Q. I'll show you Exhibit RR.

2 MR. BRESSLER: May I approach, your Honor?

3 THE COURT: You may.

4 A. Thank you.

5 Q. Can you tell us what Exhibit RR is?

6 A. Okay. Exhibit RR is a -- on Page 1, two receipts, one from
7 Strawberry stores and one from Jack's World, indicating the
8 purchase of novelty items and in the case of Jack's, cosmetics.

9 Q. And these items that were purchased were the Excell
10 fragrances, correct?

11 A. I believe so.

12 MR. BRESSLER: I move Exhibit RR into evidence.

13 THE COURT: Any objection?

14 MS. PEARSON: No objection, your Honor.

15 THE COURT: Admitted.

16 (Defendant's Exhibit RR received in evidence)

17 Q. And the pictures on the back of RR are pictures that your
18 investigator took of Excell and other products at these
19 locations, correct?

20 A. I believe so.

21 Q. And the receipt shows from Strawberry there were at least
22 four items that were purchased, four Excell products, correct?

23 MS. PEARSON: Objection, your Honor.

24 THE COURT: Overruled.

25 A. I don't know.

H3NPCOT2

Conklin - Cross

1 Q. Well, let's look at them.

2 A. Looking at the summary here, it's hard to tell exactly what
3 they were.

4 Q. Well, let's look to the numbers on the left-hand side.

5 A. Okay.

6 Q. The first three end with 5400, correct?

7 A. Correct.

8 Q. The first two or three?

9 A. Three.

10 Q. Next three end with 600?

11 A. Correct.

12 Q. The next three end with 500?

13 A. Correct.

14 Q. The next three end with 200?

15 A. Correct.

16 Q. And the next one is a different ending with 500, correct?

17 A. Correct.

18 Q. All right. So you have five products there, right?

19 MS. PEARSON: Objection.

20 THE COURT: Overruled.

21 A. Again, I cannot -- I do not know if those numbers
22 correspond to a particular product. It would -- I'd be
23 speculating.

24 Q. Do you recall how many products your investigator bought?

25 A. I do not.

H3NPCOT2

Conklin - Cross

1 Q. And then on Jack's World, other fragrance products were
2 bought. Excell products were brought, right?

3 A. I believe so.

4 Q. So --

5 THE COURT: Can I interrupt for one second. Do you
6 have a copy of RR? The binder you gave me has a page that says
7 "Document intentionally removed."

8 MR. BRESSLER: It's in the additional exhibits, your
9 Honor, but I have another copy to hand your Honor.

10 THE COURT: Oh, I see. Okay. Thank you.

11 Q. One of the products that your investigator purchased and
12 that you tested was Euphoria for women, right?

13 If you like, I can hand you a copy of the complaint in
14 this case and it will refresh your recollection.

15 MR. BRESSLER: Your Honor, may I approach?

16 THE COURT: I don't think he answered your prior
17 question; so --

18 Q. Do you know the answer, if one of the products was Euphoria
19 for Women?

20 A. I'm not certain.

21 MR. BRESSLER: May I approach, your Honor?

22 THE COURT: Now you may.

23 Q. If you look to paragraph 38 of the complaint, it talks
24 about Euphoria fragrances for women?

25 A. Yes.

H3NPCOT2

Conklin - Cross

1 Q. And this complaint was filed in 2015, correct, if you look
2 at the very top?

3 A. Correct.

4 Q. September 4th, 2015?

5 A. Correct.

6 Q. That was prior to the second set of testing that Coty
7 performed on more of Excell's products?

8 A. I believe that's correct.

9 Q. All right. So you folks had a copy of Euphoria for Women
10 in 2012, right?

11 A. Yes, I believe it was.

12 Q. From having a product, you knew where -- you knew who the
13 seller was, you knew that it was Excell, right?

14 A. Yes.

15 Q. And you knew their location, correct?

16 A. I'm not certain if the packaging had the location or not.

17 Q. I can show you a copy, if you like.

18 A. Sure.

19 MR. BRESSLER: Your Honor, may I approach?

20 THE COURT: You may.

21 A. Yes, it has an address.

22 Q. But you didn't send an investigator to Excell's offices,
23 did you?

24 A. No.

25 Q. You didn't do anything, other than send the investigator to

H3NPCOT2

Conklin - Cross

1 Jackson, to Strawberry's, to find out the extent of Excell's
2 use, did you?

3 A. I am not certain about that. I'm not certain about what
4 else we did or did not through counsel, but in terms of on
5 direct activity through Coty, I do not recall any further
6 follow-up with Excell.

7 Q. Now, you refer in your affidavit to Nielsen reports; do you
8 recall that?

9 A. I do.

10 Q. And you have access to Nielsen reports, in general?

11 A. The company does. I do not.

12 Q. Did you check the Nielsen reports to see the extent of
13 Excell's sales in 2012?

14 A. I did not, no.

15 Q. Did anybody at Coty?

16 A. I can't speak for anyone else, I'm sorry.

17 Q. Well, you're in charge of trademark litigation, right?

18 A. Yes.

19 Q. Did you check the Nielsen reports for the extent of Coty
20 sales in 2013?

21 A. I did not check the Nielsen reports.

22 Q. Did you check the Nielsen reports to the extent of Coty
23 sales in 2014?

24 A. Not at that time, no.

25 Q. Did you check the Nielsen reports to determine the extent

H3NPCOT2

Conklin - Cross

1 of Coty sales at any time prior to the time you brought suit in
2 this case?

3 A. Coty sales?

4 Q. Excell sales. Excuse me.

5 A. I personally did not, no.

6 Q. And you know of nobody at Coty who checked the Nielsen
7 reports for the extent of Excell sales prior to the time of
8 bringing suit?

9 A. I'm sure that there were people who look at sales figures
10 along those lines and are familiar with pretty much trends
11 anyway, but I'm not aware of anyone specifically speaking to me
12 about Excell sales as depicted on Nielsen data.

13 Q. Now, another reason you say that you didn't bring suit
14 earlier was that you were waiting for clarification, if you
15 needed to name the licensee, in whose name you bring the suit,
16 correct?

17 A. Yes.

18 Q. Now, you sent cease and desist letters, and you've had
19 Ms. Pearson send cease and desist letters in the name of
20 licensees?

21 A. We have.

22 MS. PEARSON: I object to the form.

23 THE COURT: Overruled.

24 Q. I will actually clarify. You've had her send cease and
25 desist letters in the name of licensors? I think I may have

H3NPCOT2

Conklin - Cross

1 said licensees.

2 MS. PEARSON: Correct.

3 Q. My I apologies.

4 A. Yes.

5 Q. And you also acknowledge that determining who the proper
6 party was was not necessary for the section 43(a) violation
7 that you're alleging in this case, right?

8 A. Yes, but could I just clarify, though, because you make a
9 good point?

10 Q. No, you can clarify upon redirect.

11 Now, at times, Coty has joined with its licensors to
12 jointly sue alleged infringers, correct?

13 A. I apologize, Mr. Bressler, could you just repeat that
14 question.

15 Q. There have been times that Coty joins with its licensors to
16 jointly sue alleged infringers, correct?

17 A. Correct.

18 Q. Now, you could have sued, jointly sued Excell with Calvin
19 Klein, Vera Wang and Lady Gaga in 2012, right?

20 A. Yes, we could have.

21 Q. And you could have sent a cease and desist letter in one of
22 their names prior to the time you brought suit, right?

23 A. With their consent, yes.

24 Q. Now, you claim that you were waiting to hear what happened
25 in another litigation in which Excell was sued, correct?

H3NPCOT2

Conklin - Cross

1 A. Yes.

2 Q. And that would relate to Snooki?

3 A. Yes, Nicole Polizzi, I believe.

4 Q. I'm sorry, I cannot hear you.

5 A. Nicole Polizzi, yes.

6 Q. Known as Snooki?

7 A. Yes.

8 Q. Did you review the complaint in the Snooki case?

9 A. I did.

10 Q. Did you talk to the lawyers for Snooki?

11 A. I did not.

12 Q. Are you aware of whether the Snooki case even involved
13 fragrances that had, on their face "our version of"?

14 A. That's my recollection, but --

15 Q. What's your recollection based upon?

16 A. Having read the complaint, but again, that was now several
17 years ago.

18 MR. BRESSLER: I refer the Court to the complaint in
19 the Snooki case, which is also admitted into evidence, and I
20 will get the number later. It does not refer to "our version
21 of."

22 Q. Now, you claim you also had to get executive committee
23 approval before bringing suit, correct?

24 A. Yes.

25 Q. Did you meet with the executive committee?

H3NPCOT2

Conklin - Cross

1 A. I spoke with the executive committee members, yes.

2 Q. And did you tell them what the claims were that you
3 intended to bring against Excell?

4 MS. PEARSON: Objection, your Honor. Mr. Conklin is
5 in-house counsel at Coty and --

6 THE COURT: Sustained. Ms. Pearson, you can't mumble.
7 Okay? To create a record, for me to hear you, you need to
8 speak loudly, clearly and into the microphone.

9 MS. PEARSON: Okay.

10 THE COURT: Thank you.

11 BY MR. BRESSLER:

12 Q. But you did discuss bringing suit and you obtained approval
13 from the executive committee, correct?

14 A. Yes.

15 Q. Now, after you sued Excell, are you aware that Excell's
16 lawyers were approached with a settlement, for settlement
17 purposes, to discuss changes to the packaging that would
18 satisfy Coty and the other plaintiffs?

19 MS. PEARSON: Objection, your Honor.

20 THE COURT: Sustained.

21 Q. Is there a reason why Coty would not discuss changes to the
22 packaging with defendant?

23 THE COURT: Let counsel finish the question, please.
24 Are you done now?

25 MR. BRESSLER: I am, your Honor.

H3NPCOT2

Conklin - Cross

1 MS. PEARSON: I object, your Honor. The settlement
2 communications --

3 THE COURT: Sustained.

4 MS. PEARSON: -- in this case are covered --

5 THE COURT: Sustained.

6 MR. BRESSLER: Your Honor, settlements discussions are
7 inadmissible to prove liability, or lack thereof.

8 MS. PEARSON: But there is a separate agreement
9 between counsel that settlement communications were not to be
10 used for any purpose in litigation. I have it in writing from
11 Mr. Miller.

12 MR. BRESSLER: I'm not aware of that, and I'm sure
13 that the settlement agreement said, would be subject to 403.
14 403 says that it's not to be admissible for the purpose of
15 proving liability or lack thereof.

16 MS. PEARSON: It did not, your Honor.

17 THE COURT: Hold on. It's 408.

18 MR. BRESSLER: 408, sorry.

19 THE COURT: Ms. Pearson indicated there was an
20 agreement between counsel separate and apart from whatever 408
21 may say. If that's the case, then that's a different issue.

22 MS. PEARSON: Correct.

23 MR. BRESSLER: Your Honor, Mr. Miller reminds me that
24 this offer was made in open court.

25 MS. PEARSON: Your Honor, I believe that Mr. Miller

H3NPCOT2

Conklin - Cross

1 has been impermissibly discussing settlement discussions in
2 this case quite a bit, but the fact of the matter is that
3 counsel have an agreement. It's memorialized in writing that
4 settlement communications are not to be used for any purpose in
5 this litigation. It goes beyond the scope of the federal rule
6 of evidence.

7 THE COURT: All right. Can I ask you a question,
8 Ms. Pearson. If that's true, then I'm likely to agree with you
9 and sustain the objection. I don't have that agreement. It
10 hasn't been presented to me. This issue wasn't raised with me.

11 Is there any harm in allowing the witness to answer
12 the question, and then if you submit the agreement to me and I
13 agree with you, I'll disregard all this testimony, or is there
14 a separate harm in --

15 MS. PEARSON: I think it's prejudicial. I don't think
16 it should be discussed. If they're going to discuss it, then
17 we'll get into Coty's position in this. I think it should be
18 off limits. That was the agreement.

19 THE COURT: It's not prejudicial if I decide that
20 you're right and it's not admissible because I will simply
21 disregard it. Is there a harm in it coming out, separate and
22 apart from that?

23 MS. PEARSON: I don't think it's a particularly
24 harmful fact, your Honor, but I object to opposing counsel
25 violating the agreement that we had with respect to settlement

H3NPCOT2

Conklin - Cross

1 communications.

2 THE COURT: Do you have a copy of the agreement?

3 MS. PEARSON: It is an e-mail exchange. We can look
4 at it further.

5 THE COURT: Great. Well, until you present it to me,
6 I'll allow the questioning, and we can take up whether I can
7 and should rely on it later. You may proceed.

8 MR. BRESSLER: Your Honor, would you mind asking the
9 court reporter to read back the last question.

10 THE COURT: I do. You can restate the question, if
11 you like.

12 BY MR. BRESSLER:

13 Q. Mr. Conklin, is there a reason why Coty would not engage in
14 discussions with Excell as to what packaging changes would
15 satisfy Coty?

16 A. This is very difficult question to answer because it goes
17 to my internal discussions with my client that are the purview
18 of, you know, advice with respect to our legal position and
19 what we would find satisfactory as a resolution. So is there a
20 reason there? Yes, there are reasons.

21 Q. What are those reasons?

22 THE COURT: Sustained.

23 Q. Mr. Conklin, one of the complaints you had about
24 Excell's -- or you have against Excell's products is the fact
25 that in the "in our version of" language, that Excell sometimes

H3NPCOT2

Conklin - Cross

1 uses the same font as Calvin Klein's and the other plaintiffs,
2 that they use, correct?

3 A. Correct.

4 Q. Are you aware that after this litigation was commenced,
5 Excell started changing the font so that it would be neutral,
6 not reflective of Calvin Klein's and the other plaintiffs'
7 font?

8 A. I've not seen all of their updated artwork; so, no, I'm not
9 aware that that was done on a universal basis.

10 Q. Have you seen any of them?

11 A. Yes, I've seen some, but I actually don't recall a change
12 to the font.

13 MR. BRESSLER: Your Honor, I would like to show the
14 witness Exhibit 227. I found the Snooki complaint.

15 MS. PEARSON: Your Honor, we have located the e-mail
16 correspondence in terms of the settlement agreement.

17 THE COURT: Ms. Pearson, microphone, loud.

18 MS. PEARSON: We have located the document, the e-mail
19 correspondence in which Mr. Miller confirmed that the
20 settlement discussions were not admissible for any purpose. We
21 don't have a hard copy. We just have the computer version.

22 THE COURT: All right. So you'll provide a hard copy
23 to me later. I think we've moved on. It's a non-issue at the
24 moment.

25 MR. BRESSLER: May I approach the witness with

H3NPCOT2

Conklin - Cross

1 Exhibit 227?

2 THE COURT: You may.

3 MR. BRESSLER: Which is also admitted into evidence
4 pursuant to stipulation.

5 THE COURT: All right. It is admitted pursuant to the
6 stipulation.

7 (Defendant's Exhibit 227 received in evidence)

8 BY MR. BRESSLER:

9 Q. This is the -- let's call it the Snooki complaint, correct?

10 A. Okay.

11 Q. Well, you can look at the first page. It says: Snooki
12 against Excell Brands?

13 A. I see that.

14 Q. Is this the complaint in the case you were referring to
15 that you were waiting for a decision on?

16 A. Yes, I believe so.

17 Q. Is there anything in here that leads you to believe that
18 the Snooki case involved the use of "our version of" on the
19 packaging for the version of the Snooki fragrance?

20 A. Were there any exhibits to the complaint?

21 Q. This is all you folks produced.

22 THE COURT: Mr. Bressler, you're not testifying. Just
23 look at that exhibit. Is there anything in there that --

24 A. I do not see anything in the body of the complaint that
25 mentions "our version of," in looking at it quite quickly, I

H3NPCOT2

Conklin - Cross

1 might add.

2 Q. The document will speak for itself.

3 Okay. You're aware, are you not, that Excell has sold
4 approximately 4 million units of the products that you claim
5 infringe?

6 A. I'm not familiar with the exact number, but that sounds
7 ballpark to me.

8 THE COURT: What's the basis of your knowledge about
9 that?

10 THE WITNESS: Looking at exhibits from the -- from my
11 counsel.

12 THE COURT: All right. As you probably know, you
13 really have to testify based on knowledge that you personally
14 have. So knowledge that you gained in connection with
15 documents you reviewed in this litigation, you should make
16 clear if that's the only basis for your knowledge because then
17 you really shouldn't be testifying to it.

18 THE WITNESS: That would be the only basis for my
19 knowledge, your Honor.

20 THE COURT: All right.

21 BY MR. BRESSLER:

22 Q. Now, the only --

23 MR. BRESSLER: Excuse me, your Honor. I knew I'd make
24 you laugh sometime during this trial.

25 Q. The only instance of actual confusion that you folks had is

H3NPCOT2

Conklin - Cross

1 Exhibit 153, right?

2 THE COURT: Mr. Bressler, why don't you wait until you
3 pick up your papers and your head is not in the jury box to ask
4 your next question.

5 MR. BRESSLER: Thank you, your Honor.

6 Q. The only evidence of actual confusion that you have is
7 Exhibit 153?

8 MR. BRESSLER: May I approach, your Honor, and bring a
9 copy to the witness?

10 THE COURT: You may.

11 MR. BRESSLER: And this too is admitted by
12 stipulation.

13 THE COURT: I think it's already in evidence.

14 BY MR. BRESSLER:

15 Q. Is that correct?

16 A. I'm not certain what else our counsel has submitted as
17 evidence of actual confusion, if anything. This is certainly
18 one thing that we have submitted into evidence, but for
19 example, I also believe we have expert reports that go to the
20 same issue.

21 Q. Putting aside the expert report, you have no actual
22 evidence of confusion other than Plaintiff's 153, do you?

23 A. This is the only instance of consumer confusion that we
24 have produced with respect to people being actually confused.

25 Q. Plaintiff's Exhibit 153 reflects some type of contact that

H3NPCOT2

Conklin - Cross

1 somebody at Coty had with a consumer, correct?

2 A. Correct.

3 Q. And that person was calling about something called Chloe
4 Love Story, correct?

5 A. I don't know that that's what the person was calling about.
6 That would be the Coty product that was designated by our
7 customer service team.

8 Q. And that is a product by Coty, Love Story?

9 A. Yes, Chloe Love Story is the product by Coty.

10 Q. And the verbatim from consumer is: I bought a bottle of
11 Love Story. I want to know if it's counterfeit. Correct?

12 A. Yes, as well as the statement: The fragrance does not
13 last. It's to complete the verbatim.

14 Q. You don't have any basis for whether knowing this consumer
15 was talking about Love Story sold by Excell or Love Story sold
16 by Coty, do you?

17 A. That's correct. It's unclear.

18 Q. In fact, you testified: "We don't know what they're
19 talking about," right?

20 A. Could you repeat that?

21 Q. You testified at your deposition: "We don't know what
22 they're talking about," correct?

23 A. I do not have the transcript in front of me, but that would
24 not be a -- that is consistent with what -- how I would have
25 read this, yes.

H3NPCOT2

Conklin - Cross

1 Q. And you admit this is ambiguous evidence, at best, correct?

2 A. I'm not sure that I would call it ambiguous evidence. I
3 think the statement is ambiguous.

4 Q. Now, nobody -- despite all the social media that revolves
5 around fragrances, despite all the sales of Excell products,
6 nobody else -- you can't find one other instance where someone
7 is actually confused, can you?

8 A. We've not produced any other evidence of individual
9 consumers being confused, that's correct.

10 MR. BRESSLER: Your Honor, if I may take a second now
11 to fix up what I dropped.

12 Q. Now, you know that our products are sold for 4.99, right?

13 A. That's what I've been told by Excell, but I do not know
14 that that is what they're all sold at. I know there was a
15 slightly different price point at Strawberry's and Jack's World
16 receipts. If I could pull those back, I could confirm those
17 numbers, and I know that I have see them advertised online at
18 higher prices as well.

19 Q. So the Jackson Strawberry show lower numbers than 4.99,
20 right?

21 A. May I?

22 Q. Sure.

23 A. The Jack's World shows six cosmetics for 23.94; so I'm not
24 exactly sure of the math, but a little more than \$4, roughly
25 \$4, and slightly less than that at -- for some of the SKUs at

H3NPCOT2

Conklin - Cross

1 Strawberry. One is 4.99, the others appear to be 3.33 or 3.34.

2 Q. And the products at issue that Coty sell, for example, CK
3 One sells for \$49 to a \$58 for the same size, 3.4 ounces,
4 right?

5 A. I'm not an expert on the pricing model. I think there are
6 better people to speak to that, but generally, the larger size
7 of the CK One bottle would sell at that price, but we also have
8 a one-ounce version, for example, one ounce that appears at a
9 much less price point.

10 Q. Excell's products are all 3.4 ounces, correct?

11 MS. PEARSON: Objection, your Honor.

12 THE COURT: Sustained.

13 A. I'm not sure.

14 MR. BRESSLER: Well, your Honor, Exhibit WW, which has
15 been admitted pursuant to stipulation, is a price list of
16 plaintiff's products. May I approach?

17 THE COURT: Of plaintiff's products?

18 MR. BRESSLER: Yes.

19 THE COURT: Okay. Is WW --

20 MR. BRESSLER: It's all in the stipulation. The facts
21 are the same.

22 THE COURT: All right. Is that correct, Ms. Pearson?

23 MS. PEARSON: I think it's a summary document that
24 defendant prepared.

25 THE COURT: Ms. Pearson, louder.

H3NPCOT2

Conklin - Cross

1 MS. PEARSON: It's a summary document defendant
2 prepared.

3 THE COURT: Okay. Any objection?

4 MS. PEARSON: I can check back on my version of
5 defendant's exhibit. Okay. We have no objection, your Honor.

6 THE COURT: All right. Then it is admitted.

7 (Defendant's Exhibit WW received in evidence)

8 BY MR. BRESSLER:

9 Q. And so Exhibit WW shows, for example, Eternity for Women
10 sells, the 3.4 ounces, for 72 to \$82, right?

11 A. I'm not familiar with this exhibit. Yes, that's what this
12 exhibit purports to show. Whether or not that is the actual
13 product, actual price that our products are made available at
14 retail, I'm not certain.

15 Q. Now, you acknowledge in your declaration that there's only
16 limited overlap between where Excell's products are sold, the
17 products at issue we're talking about, and the products at
18 issue sold by Coty, correct?

19 A. Yes.

20 Q. Now, your counsel sent a revised exhibit list last night to
21 us, which they indicated they would be supplying a summary of
22 overlap of customers, but we haven't received it yet.

23 Have you been able to figure out if there's any
24 overlap of customers for the products at issue in this case?

25 THE COURT: Sustained as to form. You're not

H3NPCOT2

Conklin - Cross

1 testifying. Ask the question. Don't describe interactions
2 between counsel. Just ask a question.

3 Q. Does Coty have any information where the original and
4 "version of" product are sold at the same location?

5 A. Yes.

6 Q. What?

7 A. Well, I believe that it is from online reviews that I
8 personally did. There are Coty products that are available at
9 places that were indicated, in the course of the discovery in
10 this case, to also sell -- to also be represented as being in
11 locations to buy Excell's products.

12 Q. Are you aware of any brick and mortar stores where there
13 are any products of Coty, the original and version of the same
14 product sold at the same store?

15 A. When you say brick and mortar, so are you excluding brick
16 and mortar retailers that sell products through the website?
17 Because there we saw overlap.

18 Q. Forget website. You walk into a store. Tell me one store
19 where a consumer can go in and find a copy of OK New York by
20 Excell and CK One by Calvin Klein?

21 A. I'm not familiar with all of the stores where Excell sells
22 their products.

23 Q. Can you tell me --

24 A. I can tell you that it's my understanding that in certain
25 secondary markets you can find both products.

H3NPCOT2

Conklin - Cross

1 Q. Name one store.

2 A. At flea markets, for example.

3 Q. Name one flea market where you have seen, for example --

4 A. No, I meant that as a -- it's a fair point. I meant that
5 as a type of outlet where both product are found. I've not
6 personally seen any.

7 Q. Does Coty, in general, anybody from Coty, anybody from any
8 of the parties here -- and you're running this litigation,
9 correct? You're in charge of this litigation, aren't you?

10 A. Yes.

11 Q. Do you have any evidence whatsoever of any original product
12 by Coty and the version of by Excell being sold at the same
13 location, other than online?

14 A. Just online.

15 Q. Okay. Now, the ones you refer to online sales, now, you
16 acknowledge that most sales on Amazon and eBay are one-offs,
17 correct?

18 A. On eBay, yes.

19 Q. And you also acknowledge that when there are items offered
20 online, sometimes they may not really be there, correct?

21 A. Yes.

22 Q. Now, you also know that many of the products online that
23 purport to be Coty are, in fact, counterfeit, correct?

24 A. There are certainly products that purport to be Coty online
25 that are counterfeit. Many, as a percentage of something, is a

H3NPCOT2

Conklin - Cross

1 little bit harder to define.

2 Q. You refer in your affidavit to seeing websites where
3 products are sold, Excell products are being sold, right?

4 A. Offered for sale, yes.

5 Q. Yes. Did you ever buy any of those products?

6 A. I did not.

7 Q. Do you know for a fact that the product was actually there
8 and available for purchase?

9 A. I clicked through to see how far I could get without
10 ordering. So without having a physical product ordered and
11 delivered, the answer would be no, but I was able to get to
12 that point without saying the product was not available.

13 MR. BRESSLER: Your Honor, based upon the witness'
14 testimony, I will move to exclude as hearsay, on relevance
15 grounds, all of the Internet website printouts that the witness
16 has put in claiming to offer products of Excell's for sale.

17 THE COURT: All right. Again, I already addressed
18 this. You can go on.

19 Q. Now, in your affidavit, you talk about Excell products
20 being offered for \$25, marked down to 4.99; do you recall that?

21 A. I do.

22 Q. And you referred to Exhibit 229.

23 MR. BRESSLER: May I approach, your Honor, and
24 present?

25 THE COURT: You may how much longer do you have with

H3NPCOT2

Conklin - Cross

1 this witness, do you think?

2 MR. BRESSLER: I would say 15.

3 THE COURT: Okay. Go ahead.

4 MR. BRESSLER: Would you like a copy, your Honor?

5 THE COURT: Yes, please.

6 BY MR. BRESSLER:

7 Q. Now, referring to 229, you don't see any of the products at
8 issue in this case being offered, do you?

9 A. No, I do not. No, I do not.

10 Q. And you didn't buy any of these products either?

11 A. I did not.

12 Q. And you say that there's deceptive advertising taking
13 place. You're not saying that Excell is engaging in deceptive
14 advertising, are you?

15 MS. PEARSON: Objection.

16 THE COURT: Overruled, but because I couldn't hear the
17 objection and for other reasons.

18 Q. Paragraph 31 of your affidavit says that there's deceptive
19 advertising and you refer to Exhibit 229. My question is --
20 would you like to see your affidavit?

21 MS. PEARSON: I would because this is not my
22 recollection of the exhibit.

23 MR. BRESSLER: May I approach, your Honor?

24 THE COURT: You may.

25 Q. Showing you --

H3NPCOT2

Conklin - Cross

1 THE COURT: I think he has his affidavit.

2 A. I have it.

3 Q. Look at paragraph 31, last sentence: This deceptive
4 marketing practice suggested the perceived value of defendant's
5 product is significantly higher than it sales suggested retail
6 price, and referring to the sale of products at higher prices,
7 correct? Or offering at higher prices and then marking it down
8 to a lower price, correct?

9 A. Yes.

10 Q. You're not saying that --

11 MS. PEARSON: Your Honor --

12 Q. -- that Excell --

13 MS. PEARSON: Your Honor, the referenced exhibit,
14 though, is Exhibit 235 and not 229.

15 THE COURT: Well, you'll have redirect. Go ahead,
16 Mr. Bressler.

17 Q. You're not saying that Excell is engaging in deceptive
18 advertising, are you, deceptive marketing?

19 MS. PEARSON: I object to the form. If it's limited
20 to this paragraph, fine.

21 THE COURT: I think it is limited to this paragraph.
22 Go ahead.

23 A. The point that I'm making is that --

24 Q. Can you answer the question? Are you suggesting that
25 Excell is somehow responsible for what you call the deceptive

H3NPCOT2

Conklin - Cross

1 advertising taking place on Plaintiff's Exhibit 235?

2 A. Could I see 235, please.

3 Q. You may.

4 MR. BRESSLER: Your Honor, may I approach?

5 THE COURT: You may.

6 MR. BRESSLER: Would you like a copy, your Honor?

7 THE COURT: No. Thank you.

8 A. So I believe my statement that having products listed as
9 \$25 value --

10 Q. Sir, I'm asking you a very simple question. Are you
11 suggesting that Excell is responsible for what you call the
12 deceptive advertising taking place on Plaintiff's Exhibit 235?

13 THE COURT: Just yes or no, is Excell responsible for
14 that, in your judgment?

15 A. In my judgment, this website which looks like an initial
16 sponsored website, to me, okay it's my judgment --

17 Q. This is a yes or no question.

18 A. Yes.

19 Q. How is Excell responsible for a website that's called
20 PerfumeImpression.com? Let me withdraw it.

21 What evidence do you have that leads you to believe
22 that Excell is responsible for what you call deceptive
23 advertising that appears on Plaintiff's Exhibit 235?

24 A. It's an exclusive listing of Excell products with
25 consistent market pricing across it, at \$25 plus, and then

H3NPCOT2

Conklin - Cross

1 suggesting that it's available for a much less price; so that's
2 my impression of it.

3 Q. But you have no evidence or fact that it's exclusive, do
4 you?

5 A. No.

6 Q. Okay. And you have no evidence whatsoever that, in fact,
7 Excell has anything to do with this website, do you?

8 A. I personally do not.

9 Q. You don't even know whether Excell sells to this website,
10 do you?

11 A. I do not know the manner in which this website gets their
12 products or its affiliation with Excell.

13 Q. Referring to the markets in which Coty sells the products
14 at issue, I'd like to refer to stipulated fact 15, which was
15 entered into at the request of plaintiffs. And I'm going to
16 read that to you, Mr. Conklin:

17 "The main rationale for segmenting heterogeneous
18 markets is that a company is better able to develop a
19 satisfying marketing mix for a relatively small portion of a
20 total market than to develop a mix that meets the needs of all
21 people."

22 It's a stipulated fact. Coty, in selling the
23 products -- Would you like to see it?

24 A. Yes, please.

25 MR. BRESSLER: May I approach?

H3NPCOT2

Conklin - Cross

1 THE COURT: Just ask your question, please. The
2 stipulation is in evidence.

3 Q. Coty, in selling the products at issue, is not seeking to
4 sell these products to every level of -- every person in the
5 country, are they?

6 A. I think we'd love to sell to every person in the country.

7 Q. You're not selling to every type of store in the country,
8 are you?

9 A. I think we pretty much are, as a company, yes.

10 Q. The products that are at issue in this case?

11 A. Oh, that's a different question. The products that are at
12 issue in this case, we're not selling to every single type of
13 store.

14 Q. The products in this case are, for the most part, prestige
15 products, right?

16 A. I'm not -- there are a variety of products at issue in this
17 case. Some are higher end than others.

18 Q. You don't sell these products at Dollar Stores, do you?

19 A. I do not sell them.

20 Q. Do you think that -- Having your product in Dollar Stores
21 tarnishes the brand, for example, of Calvin Klein, right?

22 A. I defer to Calvin Klein on that question.

23 Q. Now, you state and believe that if a consumer has a bad
24 experience and associates it with Calvin Klein, it will hurt
25 Calvin Klein's reputation, right?

H3NPCOT2

Conklin - Cross

1 A. As an example of -- yes.

2 Q. Calvin Klein or Vera Wang, right?

3 A. Yes.

4 Q. Now, that's a big if, isn't it, because you have no
5 examples of a consumer having had a bad experience with any
6 Excell product, have you?

7 A. No.

8 Q. Now, you when you say in paragraph 47 of your affidavit,
9 when there are knockoffs being sold at significantly discounted
10 prices, it makes the proprietary product less desirable because
11 it is no longer seen as a luxury item losing its cache or
12 exclusivity, right?

13 A. Yes.

14 Q. That's true of any knockoff, right?

15 A. I don't know about any knockoffs.

16 Q. Knockoffs other than just that are sold at significantly
17 discounted prices?

18 A. Define knockoff in that context for me.

19 Q. I'm using your language.

20 A. Well, again, in the context that I was using it, a knockoff
21 would be the knockoffs in this case, a product that has a
22 highly similar trade dress, highly similar name, different
23 quality. So under those circumstances, yes, I would view the
24 sale of the knockoff as having a negative impact on the
25 proprietary brand.

H3NPCOT2

Conklin - Cross

1 Q. Your affidavit will speak for itself. It does not appear
2 that's what you were saying.

3 You also say this is a factor in lost sales, but you
4 admit it's not a major factor, right?

5 A. I don't believe it's a major factor, yes. I'm sorry a
6 general -- the Excell products, yes.

7 Q. Right.

8 MR. BRESSLER: Your Honor, I'm almost finished. Five
9 to seven minutes.

10 THE COURT: All right. And then we'll take a break.

11 Q. Who wrote your trial affidavit? Who wrote it?

12 A. I worked on it with counsel.

13 Q. You adopt everything in the affidavit as true?

14 A. I'm sorry?

15 Q. You adopt the affidavit? Everything that's said in there
16 is correct?

17 A. I do, except where I've said something where it's
18 qualified.

19 Q. In paragraph 32 of your complaint -- I'm sorry, your
20 affidavit, you say that ethnic consumers are more likely to be
21 confused; do you see that?

22 A. Yes.

23 Q. What ethnic consumers are you referring to?

24 A. I believe that's language from one of your witnesses, and I
25 was quoting back language from his declaration.

H3NPCOT2

Conklin - Cross

1 Q. Do you think that one of -- can you point to the witness or
2 the Excell employee who said that ethnic consumers are more
3 likely to be confused?

4 A. I believe it was Pfau or Ferullo, one of the two.

5 Q. Did you actually see the testimony?

6 A. I did.

7 Q. And then you say: Especially if English is the second
8 language.

9 What makes you think that English is a second language
10 for many of the purchasers of Excell's products?

11 A. Well, because, again, the testimony from Mr. Pfau or
12 Ferullo was that many of the consumers were ethnic and not
13 necessarily -- I believe, and again I don't have the language
14 right in front of me, but my recollection was that English was
15 not the first language for several of the demographic targets.

16 Q. And you've reviewed the proposed findings of fact in this
17 case?

18 A. I'm not sure that I have.

19 Q. Well, do you know that in there you propose to find the
20 following finding, 194, a significant percentage --

21 MS. PEARSON: Objection.

22 THE COURT: Sustained.

23 Q. Do you believe that a significant percentage of the target
24 consumers of defendant's Diamond Collection fragrances have
25 only a high school education or less schooling?

H3NPCOT2

Conklin - Cross

1 A. I wouldn't know that.

2 Q. Okay. Now, let's refer to English as a second language.

3 Referring to the only testimony on point by Mr. Ferullo says as
4 follows, on Page 115, and I'm going to ask you whether this is
5 what you're relying on.

6 THE COURT: Sustained.

7 MS. PEARSON: Objection.

8 THE COURT: Do you have any firsthand knowledge about
9 either who Excell targeted or the consumers who purchased
10 Excell products?

11 THE WITNESS: I do not.

12 THE COURT: All right. Let's move on.

13 Q. Who is Ralph Macchio?

14 A. He is the chief scientific officer at Coty.

15 Q. He's also a member of the executive committee?

16 A. He is.

17 Q. Okay. And I would like to read in from his testimony. He
18 said:

19 "Q. Do you think that a consumer buying a \$5 version of a
20 Calvin Klein product, for example" --

21 THE COURT: Mr. Bressler, don't use this witness to
22 make legal argument. All right? Ask this witness about his
23 knowledge. If you have legal argument concerning another
24 witness' testimony, I'll take it up separately when you've had
25 an opportunity to make it.

H3NPCOT2

Conklin - Cross

1 MR. BRESSLER: Your Honor, I'm just reading in for the
2 record testimony that's been designated, and it's by an
3 executive member of the executive committee and can be used for
4 any purpose.

5 THE COURT: That's fine. But ask him a question. I
6 don't want you referring to another witness' testimony.

7 I assume this is not the actor, The Karate Kid, Ralph
8 Macchio; is that correct?

9 MR. BRESSLER: I believe that's correct.

10 THE COURT: Okay. That would make it more
11 interesting.

12 Q. We can ask the witness. Is this the same Mr. Macchio as
13 The Karate Kid?

14 A. It is not.

15 THE COURT: Oh. If it was, I was going to make him
16 appear live.

17 Q. Do you agree with Mr. Macchio's testimony as follows:

18 "Q. Do you think that a consumer buying a \$5 version of a
19 Calvin Klein product, for example, would be confused to believe
20 that it was the same as the \$70 original product for purchase?

21 "A. You would need to be careful --"

22 THE COURT: Sustained. Move on to the next line of
23 questioning, please.

24 Q. Are you aware that Mr. Macchio testified that he didn't, as
25 a member of the executive committee, did not believe that there

H3NPCOT2

Conklin - Cross

1 was a likelihood of confusion between Excell's products and
2 Calvin Klein's products due to their being sold at different
3 places?

4 MS. PEARSON: Objection.

5 THE COURT: Sustained.

6 MR. BRESSLER: I have no further questions.

7 THE COURT: Very good. We'll take a ten-minute break,
8 and then continue with redirect. Counsel to both sides, just
9 elicit facts and testimony from the witness. All right? Let's
10 not make legal arguments through the witness. There's some of
11 it in the direct testimony. There was a lot of it in the
12 cross.

13 You don't need to engage him about what other
14 witnesses said or don't say, or what evidence is or isn't in
15 the record. You can make those arguments and, indeed, have
16 already made them exhaustively. So let's make this a little
17 bit more efficient and just stick to the facts, ma'am, as they
18 say. All right. Let's resume in ten minutes.

19 (Recess)

20 (Continued on next page)

H3NHCOT3

Conklin - redirect

1 THE COURT: We seem to be missing a witness and
2 Ms. Pearson, two relevant parties.

3 MR. POTTER: Someone just went out to get them. I
4 expect them to be here momentarily.

5 THE COURT: You can be seated.

6 Mr. Conklin, please retake the stand.

7 Ms. Pearson, redirect.

8 You are still under oath.

9 REDIRECT EXAMINATION

10 BY MS. PEARSON:

11 Q. Mr. Conklin, in the course of your testimony, Mr. Bressler
12 was questioning you about the reasons why you did not
13 immediately file a lawsuit. And, in particular, he was
14 discussing the Section 43(a) standing issue. You said that you
15 would like to clarify your answer. Is there a clarification
16 that you would like to make?

17 A. I think what I was trying to clarify at that point was to a
18 prior question about when we send out cease and desist letters,
19 that we do it as Coty. But I just wanted to clarify that in
20 the situations with licensors, we also need our licensors on
21 board and inform them and involve them in the process.
22 Apologies.

23 Q. With respect to the MD Distributors complaint that was
24 marked as Exhibit 156-1, you will recall that Mr. Bressler was
25 asking you a series of questions regarding the GK One product

H3NHCOT3

Conklin - redirect

1 that is shown in some of the attachments. Do you know if the
2 GK One product is an alternative fragrance that was
3 manufactured by MD Distributors?

4 THE COURT: I think we've established that he doesn't
5 have firsthand knowledge of the MD Distributors case.

6 Is that correct, Mr. Conklin?

7 THE WITNESS: That's correct.

8 THE COURT: Great.

9 MS. PEARSON: Mr. Bressler's questioning, your Honor,
10 assumed that this was a fragrance that was manufactured by MD
11 Distributors by Wayne Hamerling in charge of that division. I
12 objected to the lack of foundation. I just want to clarify
13 that that point has not been established.

14 THE COURT: Well, you have clarified that Mr. Conklin
15 has no firsthand knowledge of it whatsoever. So I'm not
16 planning to rely on his testimony regarding it. Go ahead.

17 MS. PEARSON: All right.

18 Q. Mr. Conklin, have you had occasion to review the consent
19 judgment in the MD Distributors case in connection with your
20 role in the legal department at Coty?

21 A. Yes, I have.

22 Q. And is it your understanding, sir, that the consent
23 judgment in the MD Distributors case which has been marked as
24 Plaintiffs' Exhibit 156-2 would permit MD Distributors to sell
25 the Excell products at issue in this case?

H3NHCOT3

Conklin - redirect

1 MR. BRESSLER: Objection.

2 THE COURT: Sustained.

3 Q. Does the MD Distributors consent judgment permit the sale
4 of our version of products?

5 MR. BRESSLER: Objection.

6 THE COURT: Counsel, I don't think that the consent
7 judgment between MD Distributors, which is not a party in this
8 case, and another entity that, for that matter, is not a party
9 in this case has any relevance whatsoever. I mean, whether the
10 sale of the "our version of" products in this case violate the
11 Lanham Act or New York law is a legal question that the fact
12 that there may have been a settlement between two other parties
13 in a totally different case has no bearing on.

14 MR. BRESSLER: Would you like me to explain, your
15 Honor?

16 THE COURT: Sure.

17 MR. BRESSLER: One of the many issues here, since
18 Excell is already out of business, is was the conduct of Excell
19 so egregious to point towards the disgorgement of profits? You
20 have Mr. Hamerling at MD --

21 THE COURT: How does Mr. Conklin's testimony
22 concerning a case that he was not involved in the underlying
23 facts of have any relevance to that?

24 MR. BRESSLER: That's fine, your Honor.

25 THE COURT: Good.

H3NHCOT3

Campbell - direct

1 MR. BRESSLER: But the underlying issue is relevant.

2 THE COURT: Fine. You can make that argument when the
3 time comes, but I don't think eliciting testimony from
4 Mr. Conklin on this point is going to be relevant or helpful at
5 all. Go ahead.

6 MS. PEARSON: I have no further questions, your Honor.

7 THE COURT: Great. Mr. Conklin, you may step down.

8 THE WITNESS: Thank you, your Honor.

9 THE COURT: Ms. Pearson, please call your next
10 witness.

11 You can give those to counsel, please.

12 (Witness excused)

13 MR. POTTER: Your Honor, we call Bobby Campbell to the
14 stand.

15 THE COURT: Could you say that louder and into the
16 microphone.

17 MR. POTTER: Your Honor, we call Robert Campbell to
18 the stand. Ms. Pearson is getting him from the witness room
19 right now.

20 ROBERT CAMPBELL,

21 called as a witness by the Plaintiffs,

22 having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. POTTER:

25 Q. Good morning, Mr. Campbell. Could you please state your

H3NHCOT3

Campbell - direct

1 job title for the record, please.

2 A. I'm a manager for Lady Gaga and the general manager of Ate
3 My Heart, Inc.

4 THE COURT: Could you just move up a little bit, and
5 if you could speak about a couple inches away from the
6 microphone so everybody in the courtroom can hear you, that
7 would be great.

8 THE WITNESS: Yes, sir.

9 THE COURT: Thank you.

10 MR. POTTER: Your Honor, may I approach the witness
11 and present him with a copy of this exhibit?

12 THE COURT: You may.

13 MR. POTTER: Thank you.

14 Q. Mr. Campbell, did you prepare a testimonial witness
15 statement in connection with this litigation?

16 A. Yes.

17 Q. And is the document that I have handed you a copy of that
18 witness statement?

19 A. Yes.

20 MR. POTTER: Your Honor, at this time we'd like to
21 note just a couple of changes to Mr. Campbell's witness
22 statement.

23 THE COURT: Why don't we let Mr. Campbell, who is the
24 witness, testify to those.

25 MR. POTTER: OK.

H3NHCOT3

Campbell - direct

1 THE COURT: Mr. Campbell, are you looking at
2 Plaintiffs' Exhibit 249?

3 THE WITNESS: Yes, sir.

4 THE COURT: Is that your affidavit?

5 THE WITNESS: Yes.

6 THE COURT: Did you review it before you signed it?

7 THE WITNESS: Yes.

8 THE COURT: Is there anything that you would like to
9 change or correct in the affidavit at this time?

10 THE WITNESS: There is a thing I would like to
11 withdraw, which is -- I'll find it in a moment.

12 MR. POTTER: Your Honor, as a point of clarification,
13 I apologize, I've handed the witness a copy of the exhibit that
14 has opposing counsel's objections in it, and I'd like to hand
15 him instead another copy, if that's all right.

16 THE COURT: You may.

17 THE WITNESS: Thank you. This is not mine. This is
18 Calvin Klein.

19 MR. POTTER: I apologize.

20 THE WITNESS: No problem. Thank you.

21 MR. POTTER: Thank you, your Honor. I apologize for
22 that delay.

23 THE COURT: All right. Looking at that, Mr. Campbell,
24 is there anything that you need to change? You said there was
25 something to withdraw.

H3NHCOT3

Campbell - direct

1 THE WITNESS: Yeah, I'm trying to find the paragraph.

2 MR. POTTER: Your Honor, I might direct the witness to
3 the paragraph, and then he can tell you specifically what it is
4 to withdraw.

5 THE COURT: All right. Why don't you help us out.
6 What paragraph were you looking at?

7 MR. POTTER: I'm looking at paragraph 24, your Honor,
8 on page 10.

9 THE WITNESS: I would just like to withdraw the sales
10 figure about the number of bottles sold of the fragrance. I
11 realize after signing this that that was inaccurate, and I want
12 to clarify that.

13 THE COURT: In the first sentence of paragraph 24?

14 THE WITNESS: The second sentence, "By February 2013,
15 less than six months after the launch," we can just withdraw
16 that sentence.

17 THE COURT: The whole sentence?

18 THE WITNESS: Yes, sir.

19 THE COURT: All right. So striking the second
20 sentence of paragraph 24. Any other corrections or --

21 THE WITNESS: No, sir.

22 MR. POTTER: Your Honor, just as Ms. Pearson addressed
23 earlier with Mr. Conklin, he refers to Exhibit 1, we've
24 augmented it with Exhibit 1*.

25 THE COURT: That's fine. I think we can -- again,

H3NHCOT3

Campbell - direct

1 assuming Mr. Bressler upon reviewing it didn't find any issues
2 with that, we'll just treat that as the same and a more legible
3 copy.

4 All right. Are you offering Exhibit 249 and are there
5 any exhibits to offer in connection with it?

6 MR. POTTER: Yes, your Honor. I move for the
7 admission of Plaintiffs' Exhibit 249, Mr. Campbell's witness
8 statement, as well as the following exhibits that are within
9 it. Now, some of them are subject to the parties' stipulation
10 because there's no objections, and others, there are
11 objections. Would you prefer that I list them separately or
12 just in one group?

13 THE COURT: Separately. Give me the ones that there
14 are no objections to, we'll deal with those, and then we'll
15 take up the objections separately.

16 MR. POTTER: Counsel can certainly let me know if I
17 missed anything, but I believe there are no objections and
18 deemed admitted are Plaintiffs' Exhibit 1*; 20; 21; 22; 46;
19 131-1; all of 133, that's parts 1 through 21; all of 134, parts
20 1 through 10; 135-2; 135-2; 137; 138, all parts, 1 through 19;
21 and Exhibit 141.

22 THE COURT: Some of those are already in evidence, but
23 in any event, any objection, Mr. Bressler?

24 MR. BRESSLER: No objection, your Honor.

25 THE COURT: All right. Those are admitted.

H3NHCOT3

Campbell - direct

1 (Plaintiffs' Exhibits 1*, 20, 21, 22, 46, 131-1, 133,
2 134, 135-2, 135-2, 137, 138, 141, and 249 received in evidence)

3 THE COURT: Which are the ones to which there are
4 objections?

5 MR. POTTER: I believe there are objections to
6 Plaintiffs' Exhibits 132-2, 135-3, 135-4, 135-5, and 136.

7 THE COURT: All right. First let me rule on the
8 objections with respect to the affidavit, and then we can turn
9 to the exhibits.

10 First, the objection to paragraph 14 is overruled.

11 Second, the objection to paragraph 24, that is, to the
12 last line of paragraph 24, is sustained.

13 The objection to paragraph 30, the -- sorry,
14 paragraph 29 is also sustained from "in light of" in the second
15 sentence through the end of the paragraph.

16 Paragraph 30, the objection to the first sentence is
17 sustained, and the objection to the last sentence is overruled.

18 And the objection to paragraph 31 is sustained, and
19 that is with respect to the language "if a consumer reads this
20 language" through the end of the paragraph.

21 All right. Taking up the exhibits, I'm happy to
22 retrieve them if that's necessary. Maybe you can just explain
23 what they are, and we can discuss. What's the objections,
24 Mr. Bressler?

25 MR. BRESSLER: Your Honor, I will -- in light of

H3NHCOT3

Campbell - cross

1 previous objections, I will withdraw the objections to
2 Wikipedia pages, assuming they're not being offered for the
3 truth of the matter.

4 THE COURT: I certainly don't intend to rely on
5 Wikipedia for the truth of anything, I will tell you that.

6 MR. BRESSLER: Your Honor, you know you have your own
7 Wikipedia page?

8 THE COURT: All the more reason why not to.

9 MR. BRESSLER: OK. So that's 132.

10 135-3, you'll have to excuse me. There's quite a few
11 exhibits here, your Honor. Facebook page I'll also, as long as
12 it's not for the truth of the matter, and I'm sure you won't
13 rely on it for that. I'll withdraw 135-3, -4, and -5. And
14 136, Wikipedia page again, withdrawn.

15 THE COURT: All right. So those are all admitted
16 subject to my comments earlier.

17 (Plaintiffs' Exhibits 132, 135-3, 135-4, 135-5, and
18 136 received in evidence)

19 THE COURT: All right. Cross-examination.

20 CROSS-EXAMINATION

21 BY MR. BRESSLER:

22 Q. Good morning, Mr. Campbell.

23 A. Good morning.

24 MR. POTTER: Your Honor, may I offer the witness a
25 bottle of water?

H3NHCOT3

Campbell - cross

1 THE COURT: Sure.

2 MR. POTTER: Thank you.

3 Q. Lady Gaga is pretty famous, isn't she?

4 A. Yes.

5 Q. She sang at the Super Bowl, didn't she?

6 A. Yes.

7 Q. She's up there with Michael Jordan, wouldn't you say?

8 A. In terms of fame?

9 Q. Yes.

10 A. Sure.

11 Q. OK. People know her by the name Lady Gaga; right?

12 A. Yes.

13 Q. What's her real name?

14 A. Stefani.

15 Q. Nobody knows her by Stefani, do they? Some people know her
16 as Stefani, but the public knows her as Lady Gaga; right?

17 A. Yes.

18 Q. They don't know her as Crazy Lady, do they?

19 A. No.

20 Q. Now, you testified, did you not, that Lady Gaga's fragrance
21 and Excell's fragrance, the version of it, smell similar, did
22 you not?

23 A. I said they smelled similar, not quite the same, but I
24 could notice similarities.

25 Q. Now, Lady Gaga's fragrance is an aspirational product or

H3NHCOT3

Campbell - cross

1 brand that speaks to a feeling or a lifestyle that is of a
2 higher-end aesthetic or feeling; right?

3 A. Yes, those are my words.

4 Q. And you want it sold where prestige luxury brands are sold;
5 right?

6 A. We have a tiered retail strategy that started with prestige
7 retailers, but you can buy the fragrance at drug stores, mass
8 merchants, and big box. We created a strategy whereby we
9 sought to create a higher-end product that was accessible to
10 many people through different price points, different retail
11 outlets. And part of her brand is being inclusive to all
12 people, so it's a product that speaks and feels of quality, but
13 it's accessible. You can buy it for \$15 at Duane Reade.

14 Q. It's not sold at dollar stores, though, is it?

15 A. It's not.

16 Q. And the product at issue here, the size sells for -- a
17 1.7-ounce bottle sells for 49.99; right?

18 A. Yes.

19 Q. And a 3.4-ounce bottle is around \$100; right?

20 A. Correct.

21 Q. Now, you testified that the scent is unique; correct?

22 A. Yes.

23 Q. It's not patented, is it?

24 A. I'm not aware.

25 Q. In order to design the bottle, you hired a famed fashion

H3NHCOT3

Campbell - cross

1 photographer and designer; right?

2 A. Yes.

3 Q. The bottle is very pretty?

4 A. Yes.

5 Q. It can be displayed; right?

6 A. Yes.

7 Q. In fact, if you take the claw -- the top off and you turn
8 it upside down, you can rest the bottle on it; right?

9 A. Yes.

10 Q. And the purpose of that is to rest the bottle and display
11 it on a bureau; correct?

12 A. Yes.

13 Q. Let me show you the Crazy Lady product, which is admitted
14 into evidence as Plaintiffs' Exhibit 64. I'd also like to show
15 you the Lady Gaga Fame, which is Plaintiffs' Exhibit 46.

16 May I approach?

17 A. Yes.

18 THE COURT: I'm the one who gets to decide that.

19 You may approach.

20 THE WITNESS: I apologize.

21 MR. BRESSLER: Far too much laughter going on, your
22 Honor.

23 THE COURT: Better than tears.

24 Q. I'm showing you the bottle from 64. That's Crazy Lady;
25 correct?

H3NHCOT3

Campbell - cross

1 A. Yes.

2 Q. Can you turn that upside down and rest it on the cap?

3 A. Yeah.

4 Q. The claws don't come off, do they?

5 A. Nope.

6 Q. And that is a oval-shaped bottle, is it not?

7 A. Yes.

8 Q. That's a little perilous.

9 And this is -- Exhibit 46 is roundish, different
10 shape?

11 A. I'd say it's also an oval, but shapes are slightly
12 different.

13 Q. And it rests inside the claws?

14 A. Yes.

15 Q. I'll leave them up there.

16 Now, you told Coty in 2012 that you were approached
17 and told about Crazy Lady by Excell; correct?

18 A. Yes.

19 Q. And you testified that a fan sent it to you, or sent you a
20 picture or some description of Excell's product, and said they
21 were afraid people might think it is authentic when it was not;
22 correct?

23 A. Yes.

24 Q. So the person who told you about it knew that the Excell
25 product that sold for 4.99 is not the same, is not by Lady

H3NHCOT3

Campbell - cross

1 Gaga; right?

2 MR. POTTER: Objection.

3 THE WITNESS: Yes, it was a --

4 THE COURT: Hold on, Mr. Campbell. If counsel at the
5 front table says "objection," you have to wait.

6 THE WITNESS: I didn't hear it. Sorry.

7 THE COURT: That's OK.

8 And Mr. Potter you need to make sure you're heard not
9 only by me but by the witness.

10 MR. POTTER: Understood.

11 THE COURT: All right. Sustained.

12 MR. POTTER: Thank you, your Honor.

13 BY MR. BRESSLER:

14 Q. You testified, did you not, that the Excell version of Fame
15 that you considered to be the -- withdrawn.

16 You testified, did you not, that you consider or one
17 could consider the phrase "Our version of Lady Gaga's Fame" to
18 be a disclaimer?

19 A. Are those my words in here?

20 Q. In your deposition -- I'll first ask you, before you even
21 go there, do you consider the phrase "our version of Lady
22 Gaga's Fame" to be a disclaimer of sorts?

23 A. I believe that it means that it's a -- I mean, I don't mean
24 to use the same word, but a version of. So whether that's a
25 disclaimer or description, I'm not sure, but I believe it to

H3NHCOT3

Campbell - cross

1 mean that they're in some ways connected.

2 Q. You don't have any evidence of actual -- any consumer or
3 anybody actually thinking that Excell's product is connected
4 with Lady Gaga, do you?

5 A. Only the speculation of the fan that you already mentioned
6 that thought that, you know, it was misleading to see a
7 fragrance listed similar to ours.

8 MR. BRESSLER: I have no further questions.

9 THE COURT: All right. Redirect?

10 MR. POTTER: No, your Honor.

11 THE COURT: All right. Mr. Campbell, thank you. You
12 may step down.

13 THE WITNESS: Thank you.

14 (Witness excused)

15 MR. BRESSLER: Your Honor, may I go up and put the
16 bottles away?

17 THE COURT: You may, and please do. Next witness.

18 MR. POTTER: Your Honor, the next witness will be
19 William Mitchell, and we are getting him now from the witness
20 room.

21 THE COURT: Mr. Mitchell, if you want to come up here,
22 please, to the witness box.

23 WILLIAM MITCHELL,

24 called as a witness by the Plaintiffs,

25 having been duly sworn, testified as follows:

H3NHCOT3

Mitchell - direct

1 DIRECT EXAMINATION

2 BY MR. POTTER:

3 Q. Good morning, Mr. Mitchell. May I get you a bottle of
4 water, or are you OK?

5 A. I'm fine.

6 Q. Would you please state your job title and your employer for
7 the record, Mr. Mitchell.

8 A. I'm executive vice president and chief operating officer of
9 Vera Wang.

10 MR. POTTER: Your Honor, may I approach the witness
11 and present him with Exhibit 250?

12 THE COURT: You may.

13 MR. POTTER: Plaintiffs' Exhibit 250. Thank you.

14 THE COURT: Let's do this a little more quickly.
15 Mr. Mitchell, is Exhibit 250 an affidavit that you signed in
16 connection with this case?

17 THE WITNESS: Yes.

18 THE COURT: And before signing it, did you review it?

19 THE WITNESS: Yes.

20 THE COURT: Is there anything in the affidavit that
21 you would need to correct or change?

22 THE WITNESS: No.

23 THE COURT: All right. Are you offering Exhibit 250?

24 MR. POTTER: I am.

25 THE COURT: Are there any exhibits that you want to

H3NHCOT3

Mitchell - direct

1 offer in connection with it?

2 MR. POTTER: There are.

3 THE COURT: Can you identify those to which there's no
4 objection first, please.

5 MR. POTTER: Sure. Those would be Plaintiffs'
6 Exhibits 27; 28; 29; 30; 82-1; 115-1; 115-3; all of 116, that's
7 parts 1 through 5; all of 122, that's parts 1 through 7; 125,
8 126; 127; and 131.

9 THE COURT: All right. Those are admitted. I think
10 some of them were already as well.

11 (Plaintiffs' Exhibits 27, 28, 29, 30, 82-1, 115-1,
12 115-3, 116, 122, 125, 126, 127, and 131 received in evidence)

13 THE COURT: Any as to which there is an objection?

14 MR. POTTER: Yes, your Honor. I believe those are
15 114, 115-2, 117-1, -2, -3, -4, 118, 119, 120, 121-1, -2, and
16 -3, 123, and 124-1 and 124-2 and 130.

17 THE COURT: All right. So let's first deal with the
18 affidavit objections. There is an objection to paragraph 11.
19 That objection is overruled.

20 There's an objection to paragraph 13 from "our other
21 brand extensions" to the end of the paragraph. That is
22 overruled.

23 There is an objection to the last portion of
24 paragraph 22. To the extent that it's an objection to the
25 paragraph, it's overruled. I'll address the exhibits

H3NHCOT3

Mitchell - direct

1 separately if that's the nature of the objection.

2 Same with the objection to paragraph 23, the last
3 sentence.

4 Same with the objection to paragraph 25, the last
5 sentence.

6 Paragraph 27, the last sentence, same ruling.

7 There's an objection to an exhibit in 28 that I will
8 address separately.

9 The objections to paragraphs 38 to 40 are sustained to
10 the extent that they refer to what customers might believe.

11 The objections to paragraphs 41 and 42 are overruled.

12 Let's talk about the exhibits. Mr. Bressler, I don't
13 know if these are in the same category. If they are, then
14 subject to my ruling earlier, any objection, and does that pare
15 it down?

16 MR. BRESSLER: There are many that will be withdrawn
17 by the previous ruling. So I don't miss anything, why don't
18 we, if you don't mind, go through them:

19 114 is OK.

20 115, OK.

21 117 in its entirety is OK.

22 118, OK.

23 119 is OK.

24 120 is OK.

25 121, same, OK.

H3NHCOT3

Mitchell - cross

1 123, Instagram, OK.

2 124, OK.

3 125, OK.

4 THE COURT: I think 130 is the last one that was --

5 MR. BRESSLER: 130 is a retailer presentation which is
6 irrelevant. This relates to consumers, not retailers.

7 THE COURT: All right. So it's a relevance objection?

8 MR. BRESSLER: Yes.

9 THE COURT: All right. I'll take it and give it
10 whatever weight it deserves. If it's relevant, that will be
11 zero, and if it is relevant, it's admissible. So that is
12 overruled.

13 (Plaintiff's Exhibits 114, 115-2, 117-1, 117-2, 117-3,
14 117-4, 118, 119, 120, 121-1, 121-2, 121-3, 123, 124-1, 124-2,
15 and 130 received in evidence)

16 THE COURT: You may proceed with cross-examination.

17 CROSS-EXAMINATION

18 BY MR. BRESSLER:

19 Q. Good morning.

20 A. Good morning.

21 THE COURT: Mr. Mitchell, if you can just scoot up a
22 little bit. If you're two or three inches away from the
23 microphone as I am, that's sort of the ideal distance. Thank
24 you.

25 Q. In paragraph 29 of your trial affidavit you talk about the

H3NHCOT3

Mitchell - cross

1 different areas of distribution fragrances; correct?

2 A. Correct.

3 Q. You say the lowest tier includes drug stores or discount
4 chains like CVS, Walgreens, or Costco; correct?

5 A. Currently, correct.

6 Q. And that's the lowest tier that you, Vera Wang, will sell
7 their products; right?

8 A. Not necessarily.

9 Q. Well, that they do sell the products at issue?

10 A. Currently.

11 Q. And you know there's a level of distribution below a CVS,
12 Walgreens, or Costco; correct?

13 A. Yes.

14 Q. And that would include, for example, dollar stores which
15 you've described as a cheap, cheap Costco; correct?

16 A. Correct.

17 Q. You don't sell to dollar stores currently; right?

18 A. Do not.

19 Q. Now, the two bottles at issue here, the Princess bottle,
20 it's very unique; right?

21 A. Yes, as far as we see it, yes.

22 Q. And Vera Wang designed it; right?

23 A. Yes.

24 Q. And it's a bottle that Vera Wang hopes and believes people
25 buy and display on their bureau; correct?

H3NHCOT3

Mitchell - cross

1 A. Sure.

2 Q. Same thing with the Lovestruck bottle with the big flower
3 bouquet on the top?

4 A. Sure.

5 Q. It's eye-catching?

6 A. Yes.

7 Q. All right. It's meant to spur sales; right?

8 A. It's an element within it. It's a part of it.

9 Q. Now, you talk about damages in your declaration, and you
10 say there's lost sales that you attribute to Excell's products;
11 correct?

12 A. I would attribute the potential for lost sales. I can't
13 quantify actual lost sales.

14 Q. Well --

15 A. But anytime that somebody takes an item that's similar to
16 ours in any product category, it could hurt and hinder our own
17 sales.

18 Q. Now, your sales have been down of both Princess and
19 Lovestruck; right?

20 A. Yes.

21 Q. And Princess is down because of a lack of support by
22 Macy's; right?

23 A. It's a combination of things. The Macy's is a function of
24 where we go and the direction of our business. You know, Vera
25 starts off at a very high end, very luxury brand, and in time

H3NHCOT3

Mitchell - cross

1 we try to broaden that, that image, and broaden that
2 distribution. So Macy's no longer carries a significant amount
3 of it, so we lose those sales. So we go to other distribution
4 channels.

5 Q. And you testified, did you not, that the sales are also
6 down because there's an inability of Kohl's to recapture the
7 lost sales from Macy's; right?

8 A. Well, Kohl's is not nearly as large in fragrance as Macy's
9 is. You know, Macy's is very -- it's a huge opportunity to
10 gain sales. Kohl's doesn't have that opportunity.

11 Q. Now, Lovestruck was an immediate success; right?

12 A. I don't recall the actual results of Lovestruck early on.
13 You know, it's one of the -- one of our probably 12 different
14 fragrances that we've had, I'd say.

15 Q. You testified, did you not, though, that you did not
16 consider Lovestruck to be a very successful or strong product?

17 A. Not when you -- well, it's not nearly as successful as the
18 original Vera Wang or the Princess, which was extremely
19 successful.

20 Q. Now, you testified that the reason it's not as successful
21 is it could be the big flowers or the scent; right?

22 A. Multiple reasons. It could be scent. It could be
23 packaging. It could be marketing. It could be the retailers.
24 It could be anything.

25 Q. You testified Excell's product almost certainly causes

H3NHCOT3

Mitchell - cross

1 confusion in the marketplace; right?

2 A. In the two products I've seen, I believe that that causes
3 confusion, yes.

4 Q. But you have no evidence that anybody's ever thought that
5 Excell's product was actually a product by Vera Wang, do you?

6 A. I have not done any test.

7 Q. No one's ever complained to Vera Wang and/or anybody that
8 you know of saying Excell's product is not as good, and I
9 thought it was yours; right?

10 A. Well, we -- we as --

11 Q. It's a yes-or-no question. Did anybody complain?

12 A. Not to us directly. That wouldn't come to us.

13 Q. And you wouldn't know about it either?

14 MR. POTTER: Objection.

15 A. Well, we do know if Coty is informed of it. They would
16 have to notify us.

17 Q. Did Coty ever notify you?

18 A. Only through the -- this process that I've learned that
19 they've identified, looked into it. I don't have all the
20 specifics to it.

21 Q. Now, you testified at paragraph 41 of your affidavit that
22 consumers could have a negative reaction to the store where the
23 products are sold, lessening the esteem for the Vera Wang
24 brand; right?

25 A. If they think it's a Vera Wang product, sure.

H3NHCOT3

Mitchell - redirect

1 Q. OK. But you said -- in your deposition you testified that
2 you would sell, Vera Wang would sell, to a dollar store if
3 somebody approached them with a good opportunity; right?

4 A. Well, like any brand --

5 Q. It's a yes or no. Would you?

6 A. I would sell -- I would sell to anybody to make money
7 somehow, yes.

8 MR. BRESSLER: No further questions.

9 THE COURT: All right. Redirect?

10 MR. POTTER: Very briefly, your Honor.

11 REDIRECT EXAMINATION

12 BY MR. POTTER:

13 Q. Mr. Mitchell, when Mr. Bressler was just asking you about
14 evidence of any actual confusion and whether anybody, I believe
15 the question was, has come to you or to Vera Wang or to anybody
16 else you know to say that Excell fragrances isn't as good, and
17 in any event, you wanted to give a broader answer and
18 Mr. Bressler cut you off. If there's additional information
19 you'd like to provide to clarify your answer, you may.

20 A. With respect to instances, again, there's many people
21 involved in the process. I don't have any information other
22 than what you have shared with us that Coty has, you know, on
23 occasion been notified or given a call. We -- we don't -- even
24 in all of our licenses we don't hear about all the complaints
25 that might go to the licensees, whether it's a business that we

H3NHCOT3

Mitchell - redirect

1 have with Kohl's or whoever it may be. Those complaints go
2 directly to the licensee, so I'd have to go to Coty and ask
3 them specifically for any of those.

4 THE COURT: All right. Question is have you received
5 any information from Coty or from a consumer with respect to
6 instances of actual confusion between the two products in this
7 case?

8 THE WITNESS: Not from my day to day, I have not.

9 THE COURT: All right.

10 Q. Mr. Mitchell, you were also testifying under the
11 circumstances in which Vera Wang might put its products in a
12 dollar store.

13 A. Yes.

14 Q. Would you like to add a little bit more on that?

15 MR. BRESSLER: Objection.

16 THE COURT: Sustained.

17 Q. Mr. Mitchell, under what circumstances might Vera Wang, if
18 at all, consider putting its fragrance products in a dollar
19 store?

20 A. If there's an opportunity for the business and we feel it's
21 proper for the brand and we balance what we do for the brand
22 and what we've built over the years and if there's an
23 opportunity to do well in that distribution, we would consider
24 it and in most cases, if it's a good opportunity, do it. Just
25 as we did with Walgreens and drug stores, we -- you know, we

H3NHCOT3

Mitchell - redirect

1 weren't in those for a number of years, and now we've decided,
2 as we broaden our distribution, to go into those.

3 At the same time, being in a branded business for most
4 of my working life, understanding it, we also build a brand on
5 the high end. So we have to do the things that drive the image
6 to balance wherever we may go. So if we go to a drug store for
7 fragrance, we're going to want to have a high-end fragrance or
8 another aspect of our business in order to keep that balance;
9 otherwise, you'll eventually fade away.

10 So if somebody gave you the opportunity to go to a
11 dollar store and -- we would have to balance that with our
12 brand and with the right opportunity, why wouldn't we?
13 Everybody would want to make more money.

14 MR. POTTER: Thank you, Mr. Mitchell. No further
15 questions.

16 THE COURT: All right.

17 MR. BRESSLER: Your Honor, may I make a suggestion?
18 Things are moving very quickly, and I think that it's going to
19 be -- I probably have an hour, at most.

20 THE COURT: Can we let Mr. Mitchell go?

21 MR. BRESSLER: I'm sorry. Yes.

22 THE COURT: You may step down. You're excused,
23 Mr. Mitchell.

24 (Witness excused)

25 MR. BRESSLER: Given that I do have a little

H3NHCOT3

Mitchell - redirect

1 restructuring of papers to do, see whether I can cut back on my
2 other ones, would it be OK to break at this point and resume
3 after 1:00? We'll probably be done by 2:00 o'clock.

4 THE COURT: Well, I have a commitment from 1:00 to
5 2:00, so we certainly can't resume at 1:00.

6 MR. BRESSLER: 2:00 o'clock?

7 THE COURT: I think the witnesses are here, I assume.

8 MR. BRESSLER: We'll proceed, your Honor.

9 THE COURT: Very good. I'm hoping we can even finish
10 by 1:00 on a -- try and adjust on the fly.

11 Next witness.

12 MR. BRESSLER: Thank you.

13 THE COURT: Mr. Potter, next witness.

14 MR. POTTER: Your Honor, plaintiffs call Deirdre Miles
15 Graeter, and she's being retrieved from the witness room now.

16 Your Honor, while we have this momentary break, would
17 you like to just take the witness through the witness statement
18 authentication?

19 THE COURT: Sure.

20 MR. POTTER: Seems to be moving quickly.

21 MS. PEARSON: You do it so well, your Honor.

22 MR. BRESSLER: Your Honor, would you mind conducting
23 my cross as well?

24 MR. POTTER: That I'd object to.

25 THE COURT: Be careful what you wish for also.

H3NHCOT3

Mitchell - redirect

1 MS. PEARSON: I think we'll be really good and smooth
2 by the end of the trial.

3 THE COURT: All right. Ms. Miles-Graeter, if you
4 could come up here, please.

5 THE DEPUTY CLERK: Please remain standing and raise
6 your right hand.

7 DEIRDRE MILES-GRAETER,

8 called as a witness by the Plaintiffs,

9 having been duly sworn, testified as follows:

10 THE COURT: All right. Ms. Miles-Graeter, if you
11 could just move up a little bit and move the microphone closer
12 to you as well. If you're about two inches or so away from the
13 microphone, it is the ideal distance.

14 Ms. Potter, does Ms. Miles-Graeter have a copy of her
15 affidavit?

16 MR. POTTER: May I approach, your Honor, and I'll
17 present her with one.

18 THE COURT: You may.

19 THE WITNESS: Yes, please. Thank you.

20 THE COURT: All right. Ms. Miles-Graeter, do you have
21 a copy of Plaintiffs' Exhibit 248 there?

22 THE WITNESS: Yes.

23 THE COURT: Is that a copy of an affidavit you
24 prepared in connection with this case?

25 THE WITNESS: Yes.

H3NHCOT3

Mitchell - redirect

1 THE COURT: Did you review it before you signed it?

2 THE WITNESS: Yes.

3 THE COURT: Is there anything that you would like to
4 change or correct in the affidavit at this time?

5 THE WITNESS: No.

6 THE COURT: All right. Do you offer Plaintiffs'
7 Exhibit 248, Mr. Potter?

8 MR. POTTER: I do, your Honor, just with a note that
9 this one also makes a reference to Plaintiffs' Exhibit 1 which
10 now is 1*.

11 THE COURT: All right. I think we can so stipulate
12 that for the rest of the trial as far as I'm concerned.

13 MR. POTTER: Thank you.

14 THE COURT: Are there exhibits to be offered in
15 connection with this? And why don't we divide them into those
16 as to which there's no objection, those as to which there is.

17 MR. POTTER: Certainly. The exhibits for which there
18 is no objection are Plaintiffs' Exhibits 1 through 9; 11
19 through 19; 31; 33; 82-1; all of 85 parts 1 through 14; all of
20 86, parts 1 through 16; all of 88, parts 1 through 3; 89; all
21 of 90, parts 1 and 2; all of 91, parts 1 and 2; 93-1; 93-2;
22 93-4; 93-5; and 93-6; 95; 96-1; all of 98, that's parts 1
23 through 6; all of 99, parts 1 through 4; all of 100, parts 1
24 through 10; all of 102, parts 1 through 4; 103-2; 103-3; 103-4;
25 all of 105, that's parts 1 through 5; and all of 106, that's

H3NHCOT3

Mitchell - redirect

1 parts 1 through 3.

2 THE COURT: All right. Mr. Bressler, any issues
3 there?

4 MR. BRESSLER: I accept counsel's representation.

5 THE COURT: All right. Those are admitted without
6 objection.

7 (Plaintiffs' Exhibits 1 through 9, 11 through 19, 31,
8 33, 82-1, 85, 86, 88, 89, 90, 91, 93-1, 93-2, 93-4, 93-5, 93-6,
9 95, 96-1, 99, 100, 102, 103-2, 103-3, 103-4, 105, and 106
10 received in evidence)

11 THE COURT: Are there other exhibits as to which there
12 is an objection?

13 MR. POTTER: There are, your Honor. Those are
14 Plaintiffs' Exhibits 84-1 and 84-2, 92-1, 93-3, 93-7, and 93-8,
15 96-2, and 96-3, 97, 101, 103-5, and 103-6, 104, and 107-1, -2,
16 and -3.

17 THE COURT: All right. Mr. Bressler, any of those
18 that we can withdraw in light of the earlier rulings and
19 discussions?

20 MR. BRESSLER: 84 -- mind, your Honor, I remain seated
21 so I can read?

22 THE COURT: Sure.

23 MR. BRESSLER: 84-1 is OK. 84-2, OK. 92 and 93 are
24 all OK. 96 is OK. 97, relevance as to a press release, but I
25 assume you'll let it in so --

H3NHCOT3

Mitchell - redirect

1 THE COURT: Subject to my ruling earlier, admitted.
2 Go ahead.

3 MR. BRESSLER: 101, all OK. I'm sorry. Yes, 101's
4 OK. 103 is OK. 104, same, OK. And 107, all OK. No
5 objections.

6 THE COURT: Great. So they are all admitted.
7 (Plaintiff's Exhibits 84-1, 84-2, 92-1, 93-3, 93-7,
8 93-8, 96-2, 96-3, 97, 101, 103-5, 103-6, 104, 107-1, 107-2, and
9 107-3 received in evidence)

10 THE COURT: Without objection. Subject to my ruling
11 earlier. All right. Cross-examination.

12 MR. BRESSLER: Does your Honor want to go through the
13 affidavit first, the objections contained therein?

14 THE COURT: I did, didn't I?

15 MR. BRESSLER: No.

16 THE COURT: My apologies. I thought I did, but
17 apparently, I got ahead of myself.

18 MR. POTTER: Your Honor, I believe there may be
19 only --

20 THE COURT: I got it. Paragraph 45, the objection is
21 sustained.

22 Paragraph 48, the objection is overruled, but I will
23 not consider the first sentence of that paragraph for the
24 truth, just for the witness' understanding and state of mind.

25 You may proceed with cross.

H3NHCOT3

Miles-Graeter - cross

1 MR. BRESSLER: Thank you, your Honor.

2 CROSS-EXAMINATION

3 BY MR. BRESSLER:

4 Q. Good morning. Good morning.

5 A. Good morning.

6 Q. You have testified in your affidavit that the packaging for
7 the Calvin Klein products is unique and distinctive; correct?

8 A. For each one, yes.

9 Q. Now, you're aware that the CK One products have a
10 flask-shaped bottle; correct?

11 A. I believe it's a bottle shaped with a screw-on cap.

12 Q. And it's described as a flask-shaped bottle; right?

13 A. I think some people do refer to it as a flask shape.

14 Q. Let me show you Plaintiffs' Exhibit 90-2 which is admitted
15 into evidence pursuant to stipulation.

16 May I approach, your Honor?

17 THE COURT: You may.

18 MR. BRESSLER: Would your Honor like a copy as well?

19 THE COURT: Sure.

20 MR. BRESSLER: Thank you, your Honor.

21 Q. I believe this is an article that you introduced through
22 your affidavit.

23 A. I believe so.

24 THE COURT: Is there a question? She said, "I believe
25 so."

H3NHCOT3

Miles-Graeter - cross

1 MR. BRESSLER: Oh, I'm sorry. I did not hear her.

2 THE COURT: Ms. Miles-Graeter, just try to keep your
3 voice up and speak into the microphone, if you would.

4 Q. Do you see in the page 2, number ten, Burberry Brit?

5 A. Yes.

6 Q. That bottle is flask-shaped as well, isn't it?

7 A. I suppose you could refer to it as flask-shaped.

8 Q. And if you refer to number six, Terre d'Hermes by Hermes?

9 THE COURT: I think it's actually Hermes.

10 THE WITNESS: Yes, that's perfect.

11 MR. BRESSLER: It's not the first time I've
12 mispronounced French words.

13 THE COURT: All right. Question.

14 Q. Do you see the bottle? It's on the top of page 47.

15 A. Yes.

16 Q. And that has the look of a bottle within a bottle, like the
17 Eternity bottle; correct?

18 A. I -- I just see a picture. I don't know if I could say
19 that from just this picture.

20 Q. OK. The next page --

21 MR. POTTER: Objection, your Honor.

22 THE COURT: There's no question on the table, so
23 overruled.

24 Q. The next page you have number three. You go to the page,
25 and it shows that's a black bottle like Dark Obsession; right?

H3NHCOT3

Miles-Graeter - cross

1 MR. POTTER: Objection.

2 THE COURT: Overruled.

3 A. I don't know that I would say that.

4 Q. Let me show you a series of documents or exhibits, DDD,
5 EEE, FFF, and GGG.

6 They are not admitted into evidence at this point,
7 Your Honor. May I approach?

8 THE COURT: You may.

9 MR. BRESSLER: Would your Honor like a copy as well?

10 THE COURT: I have one.

11 MR. BRESSLER: You have it. Yes.

12 Q. You were aware, were you not, that Polo, if you look to
13 DDD, has various fragrances that use different flask-shaped
14 bottles; correct?

15 A. I'm not familiar with the various Polo fragrances.

16 Q. Are you familiar with any of them?

17 A. I think I'm only -- I think I have a vague familiarity with
18 one of Romance.

19 Q. Well, the bottles in DDD, those are flask-shaped bottles,
20 aren't they?

21 A. I don't -- I would not refer to them as flask-shaped
22 bottles.

23 Q. Well, let me show you a copy of CK One.

24 May I approach, your Honor?

25 THE COURT: You may.

H3NHCOT3

Miles-Graeter - cross

1 Q. I'm sorry. I recall that you don't want to have perfumes
2 close to you.

3 A. I have allergies to some of them. CK One is OK.

4 Q. Looking at the CK One bottle --

5 THE COURT: Can you make a record of what exhibit
6 you're using.

7 MR. BRESSLER: I'm sorry, your Honor. It is
8 Exhibit 41, which is admitted into evidence.

9 Q. Similar in shape, is it not, to the red Polo bottle on
10 Exhibit DDD?

11 THE COURT: Counsel, DDD is not in evidence.

12 MR. BRESSLER: I'm sorry. I move DDD into evidence.

13 MR. POTTER: We object to its admission, your Honor.
14 There's been no foundation laid.

15 THE COURT: Sustained.

16 Q. Are you familiar with a product by a fragrance by Zegna?

17 A. Zegna?

18 Q. Z-e-g-n-a?

19 THE COURT: She beat me to it.

20 THE WITNESS: Sorry.

21 THE COURT: That's OK. Seems like Mr. Bressler's
22 limitations are not limited to French.

23 MR. BRESSLER: I do English good.

24 THE COURT: Point taken. Go ahead.

25 MR. BRESSLER: May I approach and show the bottle in

H3NHCOT3

Miles-Graeter - cross

1 Exhibit EEE to the witness?

2 THE COURT: You may approach.

3 Q. Are you familiar with this item?

4 A. No.

5 Q. Would you agree that this item by Zegna is a flask-shaped
6 bottle?

7 THE COURT: Sustained.

8 Q. Now, you don't believe that a flask-shaped bottle for -- or
9 Calvin Klein doesn't believe that a flask-shaped bottle for
10 perfume is unique, do you?

11 A. I don't -- I don't know what you mean by "a flask-shaped
12 bottle is unique." A flask is a flask. You know, there are a
13 variety of bottles.

14 Q. Do you believe that the bottle shape for CK One is unique?

15 A. Yes.

16 Q. And have you done studies to determine what other --

17 A. No.

18 Q. -- bottles are out there that are similar?

19 A. No.

20 Q. Now, you've introduced in your affidavit various
21 advertisements for Calvin Klein products, and these are all
22 admitted into evidence. And I'm going to show you
23 Exhibit 93-1, 93-3, 93-4, and 93-6.

24 May I approach, your Honor?

25 THE COURT: You may.

H3NHCOT3

Miles-Graeter - cross

1 MR. BRESSLER: Would your Honor like a copy of these
2 particular exhibits?

3 THE COURT: Sure, why not.

4 Q. There are other exhibits that I will refer to that are in
5 that clip as we go. Do you see 93-1?

6 A. Yes.

7 Q. And you see 93-3 and 93-4. OK. See those three, those are
8 examples you gave of advertisements for Obsession; correct?

9 A. Yes.

10 Q. And there's no bottle pictured in those advertisements, are
11 there?

12 A. I don't see any.

13 Q. So we have 93-1, -3, -4, and -6, no bottles.

14 Then there's 93-5, which is another advertisement you
15 introduced for Obsession?

16 A. Yes.

17 Q. That's a different bottle than the bottle at issue, isn't
18 it?

19 A. Are you referring -- when you say "the bottle at issue" --

20 Q. No, I'm sorry, the Obsession bottle at issue. Would you
21 like me to get it for you?

22 A. OK.

23 MR. BRESSLER: Appears they have not been opened yet,
24 your Honor.

25 Q. I'll hold it here in case the smell is problematic for you.

H3NHCOT3

Miles-Graeter - cross

1 A. Yeah, it's a little overpowering. That's a different
2 bottle.

3 THE COURT: All right. That's a different bottle from
4 the bottle depicted in --

5 THE WITNESS: In the ad.

6 MR. BRESSLER: This is Exhibit 43.

7 THE COURT: Thank you.

8 Q. Then 91-1 and 92 -- 91-2 are the two third-party references
9 that you gave for Obsession; correct?

10 A. I'm sorry, the two third-party? I don't know what you're
11 referring to.

12 Q. I'll refer you to your affidavit at paragraph 24. Do you
13 see at the end of 24: "Copies of select third-party media
14 references are collected in Plaintiffs' Exhibit 91"?

15 A. Number 24?

16 Q. The end of 24. May I approach and show you?

17 THE COURT: If you look at your affidavit,
18 Ms. Miles-Graeter.

19 THE WITNESS: Yes, I found it. I just wanted to see
20 the ads again.

21 OK. And the question?

22 Q. Those are the two third-party media references that you
23 cite for Obsession; correct?

24 A. Yes.

25 Q. And neither of them have the bottles for Obsession, do

H3NHCOT3

Miles-Graeter - cross

1 they?

2 A. Neither copy shows the bottle.

3 MR. BRESSLER: I'm sorry, your Honor. I cannot hear.

4 A. Neither copy shows the bottle.

5 MR. BRESSLER: May I approach, your Honor, with
6 Exhibits 98-1 and 98-2, both of which are admitted into
7 evidence?

8 THE COURT: You may.

9 MR. BRESSLER: Would you like me to take the bottle
10 away from you?

11 Q. Those are two references you give for advertising for
12 Eternity; correct?

13 A. Yes.

14 Q. And neither of those have the Eternity bottle, do they?

15 A. Correct.

16 (Continued on next page)

17

18

19

20

21

22

23

24

25

H3NPCOT4

Miles-Graeter - Cross

1 THE COURT: Ms. Miles-Graeter, just keep your voice
2 up, if you can, please.

3 THE WITNESS: Okay.

4 THE COURT: Everybody in the courtroom needs to hear
5 you.

6 BY MR. BRESSLER:

7 Q. I'd like to show you Plaintiff's Exhibit 99-4, which has
8 been admitted into evidence.

9 MR. BRESSLER: May I approach, your Honor?

10 THE COURT: You may.

11 Q. And if you look to Page 763, are you familiar with this? I
12 believe you introduced it in paragraph 31.

13 A. I believe I've seen it before.

14 Q. Okay. And when it talks about the CK One bottle, it talks
15 about how beautiful the bottle is, correct?

16 A. The phrase used is, yes, minimally beautiful.

17 Q. And Calvin Klein considers the CK One bottle to be almost a
18 collector's item, right?

19 A. I wouldn't say that.

20 Q. Well, it considers it a bottle that is attractive to
21 consumers?

22 A. Yes.

23 Q. A bottle that consumers would want to have, you know?

24 A. A bottle?

25 Q. The bottle.

H3NPCOT4

Miles-Graeter - Cross

1 A. I don't know that.

2 Q. Now, you recognize that some of the bottles at issues here,
3 some of Excell's versions of Calvin Klein's bottles, are not
4 confusingly similar to the original bottles, right?

5 THE COURT: Sustained.

6 Q. Calvin Klein's position, through your deposition testimony
7 as a corporate representative, is that the bottle for Euphrates
8 is not confusingly similar to the bottle for Euphoria; is that
9 not correct?

10 A. I believe I was asked the question when I was shown a
11 picture of the Euphoria and the Euphrates, if I thought it was
12 confusingly similar. One was clear; one was color. I said no.

13 THE COURT: Ms. Miles-Graeter, if you could scoot up
14 and be in front of the microphone. I'm sorry to keep reminding
15 you, but it's hard to hear otherwise.

16 MR. BRESSLER: I have no further questions, your
17 Honor.

18 THE COURT: All right. Redirect?

19 MR. POTTER: No, your Honor.

20 THE COURT: All right. Ms. Miles-Graeter, you may
21 step down.

22 THE WITNESS: Thank you, your Honor.

23 THE COURT: Thank you.

24 (Witness excused)

25 THE COURT: You can hand those documents to

H3NPCOT4

Miles-Graeter - Cross

1 Ms. Pearson, counsel at the front table.

2 The next witness, plaintiff?

3 MR. POTTER: Your Honor, plaintiffs next call Lori
4 Singer.

5 LORI SINGER,

6 called as a witness by the Plaintiffs,
7 having been duly sworn, testified as follows:

8 THE DEPUTY CLERK: Please have a seat.

9 THE WITNESS: Thank you.

10 THE DEPUTY CLERK: Please state and spell your full
11 name for the record.

12 THE WITNESS: Lori Singer, L-o-r-i, S-i-n-g-e-r.

13 THE COURT: All right. Mr. Potter, would you like to
14 give her Plaintiff's Exhibit 251?

15 MR. POTTER: Yes, your Honor. Thank you.

16 THE COURT: Ms. Singer, you have a copy of Plaintiff's
17 Exhibit 251 there; is that correct?

18 THE WITNESS: I'm sorry, yes.

19 THE COURT: All right. Is that an affidavit you
20 prepared in connection with this case?

21 THE WITNESS: Yes, it is.

22 THE COURT: Did you review it before you signed it?

23 THE WITNESS: I did.

24 THE COURT: Sitting here today, is there anything that
25 you would like to change or correct in that affidavit?

H3NPCOT4

Miles-Graeter - Cross

1 THE WITNESS: No.

2 THE COURT: All right.

3 MR. POTTER: Your Honor, I believe Ms. Singer's job
4 title may have changed since the execution of this. She may
5 wish to correct that for the record.

6 THE COURT: All right. What is your job title today,
7 Ms. Singer?

8 THE WITNESS: Group vice president of marketing, just
9 "for the designer fragrances" is not part of the title anymore.

10 THE COURT: All right. When did that change occur?

11 THE WITNESS: November of 2016.

12 THE COURT: All right. Mr. Potter, are you offering
13 any exhibits pursuant to this affidavit?

14 MR. POTTER: I am, your Honor, and we also certainly
15 move for admission of the affidavit itself.

16 THE COURT: Understood.

17 MR. POTTER: The exhibits to which there are no
18 objection are Plaintiff's Exhibits 127 and 131, and I believe
19 there are objections to Plaintiff's Exhibit 97, 108, 109, 112,
20 121, 129 and 130.

21 THE COURT: All right. Mr. Bressler, are those in the
22 same category or are there other issues there?

23 MR. BRESSLER: 97 is okay; 108, relevance; 109,
24 retailer presentation, also relevance. Your Honor ruled
25 previously on that; so subject to that ruling. 112, retail

H3NPCOT4

Miles-Graeter - Cross

1 presentation as well. 121 I'll withdraw. 129, withdrawn.
2 130, retailer presentation, subject to the prior ruling.

3 THE COURT: All right. So they're all admitted
4 subject to my prior rulings.

5 (Plaintiffs' Exhibits 127, 131, 97, 108, 109, 112,
6 121, 129 and 130 received in evidence)

7 THE COURT: With respect to the affidavit itself, all
8 objections are overruled except as follows. I'll make a record
9 of what the other objections are in a moment.

10 Paragraph 40, the objection is sustained as to the
11 first sentence and the last sentence.

12 Paragraph 41, the objection is sustained as to the
13 last sentence. And to be clear, that's the entirety of those
14 objections.

15 Paragraph 42, there's an objection to the entire
16 paragraph, but it is overruled as to the first sentence,
17 sustained as to the last and second sentence.

18 Let me make a record of the objections that were
19 overruled. The following objections were overruled: The
20 objection to the first sentence of paragraph 8; the objection
21 to paragraph 21; the objection to paragraph 22, the objection
22 as is to the entire paragraph except for the one sentence
23 starting "in this case;" the objection to paragraph 23, the
24 objections to paragraph 24; the objection to paragraph 26, the
25 sentence beginning "a May 9th, 2014, press release;" the

H3NPCOT4

Singer - Cross

1 objection to paragraph 31; and the objection to paragraph 33;
2 the objections to the last two sentences of paragraph 34; the
3 objections to the last sentence of paragraph 37; the last
4 sentence of paragraph 38; and the last sentence of paragraph
5 39. I've already ruled on 40 and 41 and 42; and the objection
6 to paragraph 43 is overruled as well.

7 All right. Cross-examination.

8 MR. POTTER: Just to be one hundred percent clear, the
9 images on the top of Page 13 in paragraph 33 seem to have a
10 separate -- it's tough to tell, the way it's demarcated. I
11 just want to confirm that that was overruled as well, the 602.

12 THE COURT: Yes, that was overruled.

13 MR. POTTER: Thank you, your Honor.

14 THE COURT: All right. Cross-examination.

15 CROSS-EXAMINATION

16 BY MR. BRESSLER:

17 Q. Good afternoon.

18 A. Good afternoon.

19 Q. I think you have to move a little bit forward, please.

20 THE COURT: If you could stay about two inches away
21 from the microphone and make sure you speak loudly and clearly
22 so everybody could hear you, that would be very good.

23 THE WITNESS: Sure.

24 BY MR. BRESSLER:

25 Q. You recognize, Ms. Singer, that fragrances that sell for

H3NPCOT4

Singer - Cross

1 4.99 are sold from different places than are sold from 60 to
2 \$80?

3 A. I'm sorry, could you repeat the question, please.

4 MR. POTTER: Objection.

5 Q. You recognize, do you not, that fragrances that sell for
6 4.99 are sold in different places than fragrances that are sold
7 for 60 to \$80?

8 MR. POTTER: Objection.

9 THE COURT: Overruled.

10 A. Not always.

11 Q. Do you have any evidence of the fragrances sold by Excell
12 being sold in the same places as the fragrances sold by Calvin
13 Klein?

14 A. I don't have any evidence, no.

15 Q. Now, you testified that the name Euphoria was chosen as
16 providing a euphoric escape, right?

17 A. That's one of the reasons, yes.

18 Q. Now, you know that Euphrates is a river, right?

19 A. Yes.

20 Q. Does Euphrates give a sense of euphoric escape?

21 A. I don't know.

22 Q. Now, you testified in your affidavit that it's important
23 that the bottles be pleasing and attractive to consumers. Why
24 is that?

25 A. Many consumers use packaging as one of their points of

H3NPCOT4

Singer - Cross

1 purchase, something that they're interested in.

2 Q. And many consumers buy bottles of fragrance and display
3 them on their dressers, for example?

4 A. Some do.

5 Q. And you want those bottles -- Calvin Klein wants those
6 bottles to be pleasing so consumers do want to display them,
7 right?

8 A. That's not why we want them to be pleasing or why Calvin
9 Klein wants them to be pleasing.

10 Q. You want them to be pleasing to help sell?

11 A. That's one of many factors.

12 Q. Now, the Euphoria bottle is designed by a world-renowned
13 creative director and designer, right?

14 A. Yes.

15 Q. And consumers react very favorably to the bottle?

16 A. Some consumers.

17 Q. It's considered a beautiful bottle, isn't it?

18 A. That's subjective.

19 Q. Well, let me show you Exhibit 103-4, which was admitted
20 into evidence.

21 MR. BRESSLER: Your Honor, may I approach?

22 THE COURT: You may.

23 MR. BRESSLER: Would your Honor like to have a copy,
24 and I'll get the other one?

25 THE COURT: Yes, please.

H3NPCOT4

Singer - Cross

1 Q. This is the Euphoria bottle in Exhibit 103-4?

2 A. Yes, it looks like it.

3 Q. Okay. Are you aware that the Euphoria bottle is considered
4 by many people to be a beautiful perfume bottle?

5 A. From what I'm looking at from the author of this article.

6 Q. Are you familiar with 103-4?

7 A. No.

8 Q. Are you familiar with any awards that the Euphoria bottle
9 has received, or accolades it's received, as being a beautiful
10 bottle?

11 A. Not offhand.

12 Q. Now, you testified, did you not, that you view the Excell
13 products that you saw as versions of the originals?

14 A. I don't believe I said that.

15 Q. Did you testify as follows:

16 "Q. Do you think that the Excell products that you viewed are
17 versions of the Coty product that claim to be versions of it?

18 "A. Do I?

19 "Q. Yes.

20 "A. View them?

21 "Q. Yes.

22 "A. As versions of Coty products?

23 "Q. Right.

24 "A. Yes."

25 Did you testify to that?

H3NPCOT4

Singer - Cross

1 A. If you're reading that from the testimony, yes, but I don't
2 think that's what I said.

3 Q. Would you like to look at the testimony?

4 A. Sure.

5 MR. BRESSLER: Your Honor, may I approach?

6 THE COURT: You may.

7 Q. It's on Pages 114, line 17 to 115, 4.

8 THE COURT: Is this marked as an exhibit or --

9 MR. BRESSLER: The depositions are not, your Honor.

10 THE COURT: Okay. In an ideal world, they would be
11 for the record, but they're not. You may look at the portions
12 that Mr. Bressler --

13 THE WITNESS: This here that you've marked?

14 MR. BRESSLER: Correct.

15 THE WITNESS: Okay.

16 (Pause)

17 A. The way I read this, I read it as I was clarifying your
18 question. I see there are several steps of me asking questions
19 about what you were asking.

20 Q. Did you have an opportunity to review this deposition
21 transcript?

22 A. Yes.

23 Q. Did you correct that portion of it or clarify it in any
24 way?

25 A. No, because the way I read it is not how you're

H3NPCOT4

Singer - Cross

1 interpreting it.

2 Q. Do you -- withdrawn.

3 MR. BRESSLER: I have no further questions.

4 THE COURT: All right.

5 MR. BRESSLER: Your Honor, do you have a copy of the
6 transcript?

7 THE COURT: I don't believe I do.

8 MR. BRESSLER: I have a book full of the transcripts
9 that I had meant to hand to your Honor, but since we didn't use
10 them, I did not. But I shall hand that to you. May I
11 approach, your Honor?

12 THE COURT: You may.

13 MR. BRESSLER: This says witness copies, but you're
14 welcome to it.

15 MR. POTTER: Your Honor, I object to them handing up
16 deposition transcript and pages that he didn't use and weren't
17 part of their designations to which we've not reviewed or
18 offered counter-designations.

19 THE COURT: He's just giving them to me. I'm not
20 necessarily going to look at anything. To the extent that
21 you're objecting to my being handed something, it's overruled.
22 Any redirect?

23 MR. POTTER: No, your Honor.

24 THE COURT: All right. Ms. Singer, your work here is
25 done. You may step down, and thank you.

H3NPCOT4

Singer - Cross

1 (Witness excused)

2 THE COURT: You can give that to counsel at the back
3 table, please.

4 Next witness.

5 MR. POTTER: The next witness will be Ralph Massaro,
6 your Honor, and we're retrieving him now.

7 THE COURT: Am I correct he's the last witness
8 testifying today?

9 MR. POTTER: Unless we can get the Karate Kid in here,
10 yes.

11 THE COURT: All right.

12 RALPH MASSARO,

13 called as a witness by the Plaintiffs,

14 having been duly sworn, testified as follows:

15 THE DEPUTY CLERK: Please have a seat. Please state
16 and spell your full name for the record.

17 THE WITNESS: Ralph, R-a-l-p-h, Massaro, M, as in
18 Michael, -a-s-s-a-r-o.

19 THE COURT: Do you want to approach, Mr. Potter, and
20 hand Mr. Massaro Plaintiff 254, please.

21 Mr. Massaro, you have in your hands, I think,
22 Plaintiff's Exhibit 254; is that correct?

23 THE WITNESS: Yes, sir.

24 THE COURT: Is that an affidavit that you prepared in
25 connection with this case?

H3NPCOT4

Singer - Cross

1 THE WITNESS: Yes, sir.

2 THE COURT: Can you just move up a little closer to
3 the microphone, please, and if you're about two inches away
4 from the microphone and speak loudly, it will help make sure
5 everybody can hear you.

6 THE WITNESS: Okay.

7 THE COURT: Did you review the affidavit before you
8 signed it?

9 THE WITNESS: Yes, I did.

10 THE COURT: And is there anything that you need to
11 change or correct at this time?

12 THE WITNESS: No.

13 THE COURT: All right. Are there any exhibits to be
14 offered in connection with the affidavit, Mr. Potter?

15 MR. POTTER: Yes, your Honor. There are two, both of
16 which are objected to.

17 THE COURT: Go ahead.

18 MR. POTTER: Plaintiff's Exhibits 152-1 and 152-4.

19 THE COURT: All right. So first, with respect to the
20 affidavit itself, all objections -- and I'll make a record of
21 what they are -- are overruled, subject to my ruling on the
22 motion in limine. That is to say that I've reserved judgment
23 on the arguments made in the motion in limine.

24 The objections -- and some of these may be to exhibits
25 and not the paragraphs -- are to paragraph 5, the last

H3NPCOT4

Singer - Cross

1 sentence; all of paragraph 6; all but the first sentence of
2 paragraph 7; paragraph 8; paragraph 9, all but the first
3 sentence; paragraphs 10, 11, 12, 13; and all of paragraph 14,
4 except for the last sentence. So those objections are
5 overruled except insofar as I have reserved judgment on the
6 motion in limine, and I will continue to reserve judgment on
7 that.

8 With respect to the exhibits, Mr. Bressler, tell me
9 the issues there.

10 MR. BRESSLER: 152-1 has to do --

11 THE COURT: Microphone.

12 MR. BRESSLER: 152-1 has to do with the European
13 Commission of Consumer Protection. It's irrelevant for the
14 cases in the United States. It's also hearsay.

15 152-4 is hearsay and irrelevant.

16 THE COURT: All right. I'm going to reserve judgment
17 on both of those.

18 MR. POTTER: Your Honor, if I may, may I be heard
19 briefly --

20 THE COURT: Briefly.

21 MR. POTTER: -- on the hearsay and counter-argument on
22 that? Neither of those, on the hearsay point, neither of those
23 are coming in for the truth of the matter asserted.

24 As Mr. Massaro's testimony makes clear, these are
25 publications based on which Coty chooses to adopt certain

H3NPCOT4

Massaro - Cross

1 quality control and safety standards.

2 THE COURT: The hearsay objection is overruled. I
3 will not consider them for the truth, merely for the fact that
4 they have them and rely on them. Go ahead.

5 MR. POTTER: Similarly, on the relevance objection.
6 They're relevant for that point. They go to the quality
7 control standards that Coty seeks to establish that allegedly
8 are not met by defendant's fragrances, which allegedly causes
9 harm.

10 THE COURT: All right. I'll overrule the objection
11 and consider them for whatever weight they are worth.
12 Cross-examination.

13 MR. POTTER: Thank you, your Honor.

14 Your Honor, may I speak to establish the witness' lack
15 of knowledge on the paragraphs of the affidavit that I objected
16 to on paragraphs -- based on rule 602?

17 THE COURT: You may cross-examine. You may ask any
18 question you like, and if I have an issue, I will say
19 sustained; if I don't, you may proceed.

20 CROSS-EXAMINATION

21 BY MR. BRESSLER:

22 Q. Good afternoon.

23 A. Good afternoon.

24 Q. In your affidavit you discuss chemical testing of Excell's
25 products, correct?

H3NPCOT4

Massaro - Cross

1 A. Correct.

2 Q. Those products were tested not by you, but by a man,
3 Vinod -- I forget his last name. What's his last name?

4 A. Topiwala.

5 Q. Mr. Topiwala is the one who did the actual testing, didn't
6 he?

7 A. That's not correct.

8 Q. Well, what did you do and what did Mr. Topiwala do?

9 A. I did the initial screening and identification of the
10 components in the fragrances, and I assisted in the
11 quantification of the compound DEHP, diethylhexyl phthalate.

12 Q. Did you testify that after doing the initial identification
13 of that chemical being present, that you handed it off to
14 Mr. Topiwala to determine the amount in there?

15 A. We worked together on it. The GC and the GCMS, these are
16 instruments that we use in the lab, do most of the work. So we
17 basically load the vials onto the instrument and then compile
18 the data and then remove the vials.

19 Q. And you were side by side with Mr. Topiwala while he was
20 doing this?

21 A. Not the whole time, but majority of the time, yes.

22 Q. Now, DEHP is not banned in the United States, is it?

23 A. No, it is not.

24 Q. And any DEHP you may have found is from the plastic, right?

25 A. Most of the time, yes, that's correct.

H3NPCOT4

Massaro - Cross

1 Q. Now, you don't expect a 4.99 version of -- or 4.99
2 fragrance to last as long as an expensive \$60 fragrance, do
3 you?

4 A. That's not -- I really can't answer that. It depends on
5 the componentry in the fragrance.

6 THE COURT: Mr. Massaro, if you could be about an inch
7 further from the microphone. If you're too far, it also messes
8 things up.

9 Q. Well, the essential oil is what causes the fragrance to
10 last longer, right?

11 A. That's correct.

12 Q. Okay. And the essential oils costs money, right?

13 A. Yes, they do.

14 Q. And the essential oils are more expensive than using
15 another product such as water, right?

16 A. Yes, but the price doesn't necessarily equate to long
17 lastingness. You can have cheaper ingredients that can last
18 longer than more expensive ones.

19 Q. But you didn't do any testing to see how long Excell's
20 products last, did you?

21 A. No, we did not.

22 Q. Okay. Now, you testified in paragraph 7 of your affidavit
23 that Coty's products have -- or Excell's product, excuse me,
24 I'll rephrase.

25 You testified in paragraph 7 of your affidavit that

H3NPCOT4

Massaro - Cross

1 Excell's product have significantly higher water and alcohol
2 content than Coty's, correct?

3 A. Correct.

4 Q. Now, isn't it a fact, though, that Euphoria has more
5 alcohol than Euphrates?

6 A. I would have to look at the data. The level of ethanol is
7 not a concern unless it goes over a certain level.

8 Q. Excuse me, sir, that wasn't the question. The question is
9 which has more. You testified in paragraph 7 that Excell's has
10 significantly higher water and alcohol content, and I'm testing
11 that assertion by you. Okay?

12 A. Yeah, that was a broad statement.

13 Q. All right. Let me show you the -- see if I can refresh
14 your recollection.

15 MR. BRESSLER: May I approach and show the witness a
16 document to refresh his recollection, that has already been
17 ruled inadmissible?

18 THE COURT: Inadmissible?

19 MR. BRESSLER: It's inadmissible as evidence, but it
20 can be used to refresh.

21 THE COURT: You can approach and show it to him and
22 make a record of what it is.

23 MR. BRESSLER: It was marked as 152-5, and it was
24 ruled inadmissible as hearsay. May I approach?

25 THE COURT: You can refresh a recollection with

H3NPCOT4

Massaro - Cross

1 anything, whether it's admissible or not.

2 MR. BRESSLER: Yes.

3 Q. I'm handing you the report.

4 MR. BRESSLER: Would you like a copy, your Honor?

5 THE COURT: No, thank you.

6 BY MR. BRESSLER:

7 Q. Why don't you turn to Page 4 of the report. Do you see
8 there the amount of alcohol content for Euphoria?

9 THE COURT: It's not in evidence.

10 MR. BRESSLER: I understand. I'm going to refresh his
11 recollection, your Honor.

12 THE COURT: Thank you.

13 BY MR. BRESSLER:

14 Q. Does Page 4 of this document, Exhibit 152-5, refresh your
15 recollection that --

16 A. Yes.

17 Q. Excuse me?

18 A. Yes.

19 Q. May I finish the question?

20 THE COURT: Sure, yes. Mr. Massaro, let him finish
21 his question before you answer so the nice lady down there can
22 take everything that each person in the room says.

23 Go ahead, Mr. Bressler.

24 Q. Does Page 4 of Exhibit 152-5 refresh your recollection that
25 Coty's Euphoria has more alcohol than Excell's Euphoria?

H3NPCOT4

Massaro - Cross

1 A. Yes.

2 Q. And, in fact, does Euphoria have more alcohol than
3 Euphrates?

4 A. Yes.

5 Q. Now, do you recall whether Euphoria For Men has more
6 alcohol than Euphrates?

7 A. No, I do not.

8 Q. Will you turn to Page 6. Does Page 6 of Exhibit 152-5
9 refresh your recollection as to whether Euphoria has more
10 alcohol content than Euphrates?

11 A. Yes.

12 Q. Does, in fact, Euphoria have more alcohol content than
13 Euphrates?

14 A. Yes.

15 Q. Do you recall whether OK Shock has more alcohol content
16 than -- I'm sorry. Do you recall whether CK One Shock has more
17 alcohol content than OK Rock?

18 A. No, I do not.

19 Q. Would you refer to Page 10. Does that refresh your
20 recollection as to whether CK One Shock For Her has more
21 alcohol than OK Rock For Her?

22 A. Yes.

23 Q. And, in fact, does CK One Shock have more alcohol than OK
24 Rock?

25 A. Yes.

H3NPCOT4

Massaro - Cross

1 Q. Do you recall whether CK One Shock For Him has more alcohol
2 than OK Rock For Him?

3 A. No, I do not.

4 Q. Can you turn to Page 12. Does that refresh your
5 recollection as to whether CK One Shock has more alcohol than
6 OK Rock For Him?

7 A. Yes.

8 Q. And, in fact, does CK One Shock have higher alcohol content
9 than OK Rock?

10 A. Yes, it does.

11 Q. Do you recall whether Obsession has more alcohol than
12 Possession?

13 A. No, I do not.

14 Q. Please turn to Page 14. Does that refresh your
15 recollection as to whether Obsession For Men has a higher
16 alcohol content than Possession For Men?

17 A. Yes, it does.

18 Q. And, in fact, does Obsession For Men have a higher alcohol
19 content than Possession?

20 A. Yes.

21 Q. Do you recall whether Dark Obsession has a higher alcohol
22 content than Possession Night?

23 A. No, I do not.

24 Q. Please turn to Page 16. Does that refresh your
25 recollection as to whether, in fact, Dark Obsession has a

H3NPCOT4

Massaro - Cross

1 higher alcohol content than Possession Night?

2 A. Yes.

3 Q. And, in fact, does Dark Obsession have a higher alcohol
4 content than Possession Night?

5 A. Yes, it does.

6 Q. Do you recall whether Eternity For Men has a higher water
7 and alcohol content than Serenity For Men?

8 A. No, I do not.

9 Q. Please turn to Page 20. Does that refresh your
10 recollection as to whether Eternity For Men has a higher water
11 and alcohol content than Serenity For Men?

12 A. Yes.

13 Q. Does, in fact, Eternity For Men have a higher alcohol and
14 water content than Serenity For Men?

15 A. Yes.

16 Q. Do you recall whether Eternity Aqua has a higher water
17 content than Serenity Aqua?

18 A. No.

19 Q. Please turn to Page 22. Does that refresh your
20 recollection that, in fact, Eternity Aqua has a higher content
21 than Serenity Aqua?

22 A. Yes.

23 Q. And, in fact, does Eternity Aqua have a higher water
24 content than Serenity Aqua?

25 A. Yes.

H3NPCOT4

Massaro - Cross

1 Q. Do you recall whether CK IN2U For Her has a higher alcohol
2 content than 4U?

3 A. No.

4 Q. Please look to Page 24. Does that refresh your
5 recollection that CK IN2U has a higher alcohol content than
6 Excell's 4U?

7 A. Yes.

8 Q. And, in fact, does CK IN2U have a higher alcohol content
9 than 4U?

10 A. Yes.

11 Q. Do you recall whether Vera Wang Princess has a higher
12 alcohol content than Inspiration?

13 A. No.

14 Q. Please turn to Page 26. Does that refresh your
15 recollection as to whether Vera Wang Princess has a higher
16 alcohol content than Inspiration?

17 A. Yes.

18 Q. And, in fact, does Vera Wang Princess have a higher alcohol
19 content than Inspiration?

20 A. Yes.

21 Q. Do you recall whether Lady Gaga Fame has a higher alcohol
22 content than Crazy Lady?

23 A. No.

24 Q. Please turn to Page 30. Does that refresh your
25 recollection that, in fact, Lady Gaga Fame has a higher alcohol

H3NPCOT4

Massaro - Redirect

1 content than Crazy Lady?

2 A. Yes.

3 Q. In fact, it does?

4 A. Yes.

5 Q. Do you recall whether Joop! Homme -- I'm just wondering
6 whether I had a third language -- has a higher alcohol content
7 than Jump!?

8 A. No.

9 Q. Please turn to Page 32. Does that refresh your
10 recollection that Joop! Homme has a higher alcohol content than
11 Jump!?

12 A. Yes.

13 Q. And, in fact, does Joop! have a higher alcohol content than
14 Jump!?

15 A. Yes.

16 MR. BRESSLER: I have no further questions.

17 THE COURT: Redirect?

18 REDIRECT EXAMINATION

19 BY MR. POTTER:

20 Q. Good afternoon, Mr. Massaro.

21 A. Good afternoon.

22 Q. I believe you testified when answering Mr. Bressler's
23 questions that the price of an essential oil is not necessarily
24 indicative of the duration of the fragrance that it may end up
25 in; is that correct?

H3NPCOT4

Massaro - Redirect

1 A. That's correct.

2 Q. But in your witness statement, you say that the
3 percentage -- I'm sorry. You say that you personally observed,
4 over the course of your career, that fragrances with more
5 essential oils relative to their alcohol and water content,
6 last longer on the skin; is that true?

7 A. That's true.

8 MR. BRESSLER: Objection, leading.

9 THE COURT: Sustained.

10 Q. When it comes to oils, essential oils, Mr. Massaro, and as
11 they relate to the duration of a fragrance on your skin, what
12 are the critical elements?

13 A. Well, basically --

14 MR. BRESSLER: Objection, beyond the scope.

15 THE COURT: Overruled.

16 A. The higher the level of essential oil, the more likely it
17 is to last longer on your skin.

18 Q. And do you recall whether Coty's fragrances contained
19 higher percentages of essential oil than the Excell fragrances
20 that you tested?

21 A. Yes, I believe every single one did.

22 Q. You discuss volatile organic core compounds in your witness
23 statement; is that correct?

24 A. Yes.

25 Q. And those are tied to the percentage of alcohol in a

H3NPCOT4

Massaro - Redirect

1 fragrance?

2 MR. BRESSLER: Objection.

3 A. Yes.

4 THE COURT: Sustained.

5 Q. What are the components of a fragrance that contribute to
6 it's volatility as an organic compound?

7 MR. BRESSLER: Objection.

8 THE COURT: Basis?

9 MR. BRESSLER: Beyond the scope.

10 THE COURT: I'll allow it. Overruled.

11 A. Ethyl alcohol.

12 Q. And is that the exclusive?

13 A. Ethyl alcohol is restricted in the State of California and
14 in Canada. If the VOC laws for fragrances that have less than
15 20 percent essential oil, the law states that there cannot be
16 any more than 75 percent of ethanol or ethyl alcohol.

17 MR. BRESSLER: Objection, move to strike that portion
18 as being legal.

19 THE COURT: All right. Overruled, subject to what I
20 said earlier.

21 MR. POTTER: No further questions.

22 THE COURT: All right. I assume nothing further,
23 Mr. Bressler?

24 MR. BRESSLER: Correct.

25 THE COURT: All right. Thank you, Mr. Massaro. You

H3NPCOT4

Massaro - Redirect

1 may step down.

2 THE WITNESS: Thank you.

3 (Witness excused)

4 THE COURT: All right. Counsel, I take it we're done
5 for the day?

6 MR. POTTER: Just a couple of quick housekeeping
7 issues, your Honor. The first is the parties are --

8 MR. BRESSLER: Your Honor, I can't hear.

9 THE COURT: Yes, microphone and loud, please,
10 Mr. Potter.

11 MR. POTTER: The parties have prepared a witness
12 stipulation speaking to all the exhibits to which there's no
13 objection, and also three other factual stipulations to which
14 defendants have agreed. With your permission, we can hand them
15 up, or we can submit it, however you'd like.

16 THE COURT: Why don't you just file them on ECF, make
17 it easier.

18 All right. Any other housekeeping, as far as you're
19 concerned?

20 MS. PEARSON: I think so, your Honor. We submitted
21 four fact affidavits as to which the defendant has indicated
22 they do not need to cross-examine the witnesses. So those were
23 Plaintiff's Exhibit 255, which the direct testimony of David
24 Rotter, which I know is the subject of the pending briefing.
25 But also we have Plaintiff's Exhibits 257, the direct testimony

H3NPCOT4

Massaro - Redirect

1 of Olivia A. Harris; 258, the direct testimony of Michael J.
2 Baca; and 259, the direct testimony of James W. Faris.

3 The last three, your Honor, were authenticating
4 internet printouts.

5 THE COURT: So you're offering those, and the exhibits
6 referenced therein at this time; is that correct?

7 MS. PEARSON: Yes, your Honor.

8 THE COURT: All right. Mr. Bressler, any objection?

9 MR. BRESSLER: No objection.

10 THE COURT: All right. Admitted.

11 (Plaintiff's Exhibits 255, 257, 258 and 259 received
12 in evidence)

13 THE COURT: Anything else?

14 MS. PEARSON: One comment that you made today, your
15 Honor, about the deposition excerpts. We did provide the Court
16 with our designated deposition excerpts, but they weren't
17 marked as exhibits. Do you wish us to mark them as exhibits?

18 THE COURT: No, but as a general practice, I think if
19 you're showing something to a witness in court, it is
20 preferable to have an exhibit number attached to it, but I
21 think we can do without as to the depositions, since I don't
22 think there will be any dispute as to what they are.

23 I had the ones you submitted. I don't think I had
24 received anything from defendants on that score; although, if
25 I'm wrong about that --

H3NPCOT4

Massaro - Redirect

1 MR. BRESSLER: Yes, your Honor, you received
2 Mr. Macchio's.

3 THE COURT: Macchio's, yes, not the Karate Kid.

4 All right. So given that we got through all of the
5 fact witnesses today, pursuant to our discussion the other day,
6 I take it we're done for today. We're not going to sit
7 tomorrow. We'll pick up on Monday with the two experts, and
8 Mr. Pfau and Ferullo, correct?

9 MR. BRESSLER: Correct, your Honor.

10 THE COURT: And then Tuesday with Ms. Tuil-Torres and,
11 if necessary, Mr. Rotter; is that correct?

12 MR. BRESSLER: Correct, your Honor.

13 THE COURT: Am I missing anyone or anything?

14 In the meantime, defendant had until today to revise
15 Mr. Pfau's affidavit.

16 MR. MILLER: That was sent last night, your Honor.

17 THE COURT: All right. You should probably send it to
18 me, as well, and if there are any issues on that, we'll take
19 them up on Monday, unless you're prepared to take them up now.
20 Although, mindful of the fact that I don't think I've seen it.

21 MS. PEARSON: I wish I were more prepared to take them
22 up now; so I don't have to invest a whole lot of time working
23 on it over the weekend, but I got it late last night and I
24 haven't had a chance to review it, but I did notice one thing,
25 your Honor.

H3NPCOT4

Massaro - Redirect

1 So again, Mr. Pfau is using a formula to allocate line
2 items in now the P and L statements, that was previously the
3 financial statements. It's a different formula than he used in
4 the prior witness statement. I never had a chance to examine
5 any witness concerning their theory of costs and deductions.
6 Mr. Pfau was never identified as a witness on this topic or was
7 he made available for deposition on this topic.

8 So you previously made a ruling with respect to
9 Defendant's Exhibit XX, which is the one that purports to apply
10 a formula to the various overhead items, and I would like
11 clarification if that applies to the new formula that Mr. Pfau
12 is now putting forward.

13 THE COURT: Well, to be clear, the gravamen of my
14 ruling with respect to XX was that it was a summary of
15 information taken from exhibits that I had ruled were not
16 admissible because they were not disclosed during discovery.

17 I don't know precisely what you're talking about here,
18 but to the extent that the affidavit includes testimony about
19 an exhibit that was turned over during discovery, I think it
20 would presumably be permissible, but I'm happy to take it up in
21 more specific fashion on Monday. And I'll either hear the
22 testimony and then decide how to deal with it, or provide a
23 ruling on a more concrete basis after you've had a chance to
24 review it. All right?

25 MS. PEARSON: Thank you, your Honor.

H3NPCOT4

Massaro - Redirect

1 THE COURT: Your briefing with respect to the 803-17
2 is due tomorrow by noon. I think that's the only thing
3 remaining that I'm expecting from you, but if there are other
4 issues, you certainly know where and how to find me. You're
5 welcome to leave the shelves there, rather than schlepping them
6 out, only to schlep them back. But I would ask that you box up
7 and remove the fragrances, please, less they do something to my
8 courtroom over the weekend.

9 I'll see you on Monday. We'll pick up at 9:00 on
10 Monday and resume with the witnesses that we've discussed.

11 Anything else? Ms. Pearson?

12 MR. BRESSLER: I assume we may leave some boxes neatly
13 on the side?

14 THE COURT: It's fine with me, as long as they are
15 very much out of the way. I don't currently have anything
16 scheduled until we resume on Monday morning, but things happen
17 and we may need the courtroom; so make sure they're not in
18 anyone's way.

19 I have a copy of an exhibit of yours, Mr. Bressler,
20 which you may get after I step down. Otherwise, I will see you
21 on Monday morning. Have a pleasant weekend. Thank you.

22 (Adjourned to 9:00 a.m. on March 27, 2017)
23
24
25

INDEX OF EXAMINATION

Examination of:	Page
-----------------	------

JOSEPH J. CONKLIN

Direct By Ms. Pearson 7

Cross By Mr. Bressler 16

Redirect By Ms. Pearson 73

ROBERT CAMPBELL

Direct By Mr. Potter 76

Cross By Mr. Bressler 82

WILLIAM MITCHELL

Direct By Mr. Potter 89

Cross By Mr. Bressler 92

Redirect By Mr. Potter 97

DEIRDRE MILES-GRAETER

Cross By Mr. Bressler 105

LORI SINGER

Cross By Mr. Bressler 118

RALPH MASSARO

Cross By Mr. Bressler 127

Redirect By Mr. Potter 136

PLAINTIFF EXHIBITS

Exhibit No.	Received
-------------	----------

1 through 31, 33 through 80, 155 through 160, 170 through 175

153 14

163, 164, 165, and 168 15

1	232, 235, and 24615
2	21933
3	1*, 20, 21, 22, 46, 131-1, 133, 134,81
4	135-2, 135-2, 137, 138, 141,	
5	and 249	
6	132, 135-3, 135-4, 135-5, and 13682
7	27, 28, 29, 30, 82-1, 115-1, 115-3,90
8	116, 122, 125, 126, 127, and	
9	131	
10	114, 115-2, 117-1, 117-2, 117-3, 117-4,92
11	118, 119, 120, 121-1, 121-2,	
12	121-3, 123, 124-1, 124-2, and	
13	130	
14	1 through 9, 11 through 19, 31, 33,	103
15	82-1, 85, 86, 88, 89, 90, 91,	
16	93-1, 93-2, 93-4, 93-5, 93-6,	
17	95, 96-1, 99, 100, 102, 103-2,	
18	103-3, 103-4, 105, and 106	
19	84-1, 84-2, 92-1, 93-3, 93-7, 93-8,	104
20	96-2, 96-3, 97, 101, 103-5,	
21	103-6, 104, 107-1, 107-2, and	
22	107-3	
23	127, 131, 97, 108, 109, 112, 121, 129	117
24	and 130	
25		

255, 257, 258 and 259 140

DEFENDANT EXHIBITS

Exhibit No.	Received
-------------	----------

BBB19
---------------	-----

AAA23
---------------	-----

RR39
--------------	-----

22752
---------------	-----

WW58
--------------	-----